Supreme Court, U.S.
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86-1117

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

RAYMOND BARTMAN, et al.,

Plaintiffs,

v.

ALLIS-CHALMERS CORPORATION, INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE, et al.,

Defendants.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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December 30, 1986

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QUESTIONS PRESENTED FOR REVIEW

1. Has an employer acted to discriminate on the basis of age against its older retirement eligible employees when it (a) knowingly and deliberately misleads such employees into believing that the employer will in fact exercise its right to modify or eliminate substantial retirement benefits during a period of post-collective bargaining agreement work, when in fact the employer had no plans to modify or eliminate such benefits and (b) acts to unilaterally announce directly to the work force only that wages would remain the same while deliberately refusing to disclose that retirement benefits were also to remain unchanged, thereby (c) causing 64% of older retirement eligible employees to refuse the employer's offer

of a post-collective bargaining agreement work opportunity and instead, to retire so as to preserve their existing retirement benefits while none of the younger workers refused the employer's offer of post-collective bargaining agreement work?

2. Does a union which abandons the age discrimination claims of forced retirees during the collective bargaining process in order to further the interests of younger workers unlawfully discriminte against the forced retirees on the basis of their ages?

A LIST OF ALL PARTIES TO THE PROCEEDING BELOW:

The caption of the case in this Court contains the names of all parties except for the below listed petitioners.[1]

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[1]. Kenneth Borgwardt, Albert Borski, William Bowman, Lloyd Brown, Richard Chojnacki, Oscar Cobbs, Conrad

Corcoran, August Drazkowski, Harvey Edminster, Jerry Eldredge, Eugene Emerich, Paul Evancy, Albert Gerlat, Philip Gumz, Rodney Hoover, John Ivkovich, Karl Jatczak, Leonard Johnson, Thomas Kendall, Adolph Kinstetter, Gregory Knich, Robert Kohls, Ralph Kosewski, Joseph Kosso, Anthony Kostich, John Kruesh, Bernard Kurth, Anton Kusy, Joseph Lasecki, James Leonard, Voldemar Liepaskalns, Gordon Loiselle, Arthur Makila, Norman Maronn, Alvin Moede, Alfonso Monar, Dale Nelson, Bernard Pagels, Robert Perling, Heinz Plieth, Philip Quartana, Raymond Reed, Charles Richardson, Doris Robinson, Donald Schwartz, Robert Swatloske, Thomas Szyper, Thomas Szyperek, Nolan Taylor, James Ullsperger, Edward Weitkunat, Eleanor West, Kenneth Zalewski, Wallace Azlewski, Leslie Luoma, and Rudolph Olson.

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REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals for the Seventh Circuit below is reported as Bartman v. Allis-Chalmers Corp., 799 F.2d 311 (7th Cir. 1986).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was rendered on August 20, 1986. Appendix at 32, 33 (hereinafter cited in the form "A- __"). The Petition for Rehearing and suggestion for Rehearing En Banc was denied by the Seventh Circuit Court of Appeals on October 1, 1986. The jurisdiction of this court to review by means of writ of certiorari is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

29 U.S.C. Sec. 623(a) provides:

> It shall be unlawful for an employer -

> (1) to . . . discharge any individual or otherwise discriminate against any individual with respect to his . . . privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;
>
> . . . .

29 U.S.C. Sec. 623(c) provides:

> It shall be unlawful for a labor organization -
>
> (1) . . . otherwise to discriminate against, any individual because of his age;
>
> (2) to limit, segregate, or classify its membership . . . in any way which would deprive or tend to deprive any individual of employment opportunities, or which would limit such employment opportunities or otherwise adversely affect his status as an employee . . . because of such individual's age;

. . . .

STATEMENT OF THE CASE

1. Procedural History

This action was commenced in March, 1983, on behalf of 65 former employees of Allis-Chalmers Corporation (A-C). Plaintiff's demanded a jury trial. This lawsuit contends that A-C violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. Secs. 623(a)(1) and (2) under both theories of disparate treatment and disparate impact by forcing the retirement of approximately 250 employees, the plaintiffs among them; liability of the defendant Union Local 248 of the United Auto Workers (Union) is premised upon its age discriminatory conduct during bargaining which occurred after the plaintiffs had left the work force in violation of 29 U.S.C. Sec. 623(c)(1) and (2). Second

Amended Complaint. Jurisdiction in the District Court was founded on 28 U.S.C. Sec. 1331 and 1337 and 29 U.S.C. Sec. 626(c)(1). Both defendants moved for summary judgment. On July 31, 1985, the District Court granted the motion of each defendant and a judgment issued dismissing the case. A-11 to -31. Plaintiffs appealed to the Court of Appeals for the Seventh Circuit on August 7, 1985.

The Court of Appeals affirmed the District Court. A-1 to -10; 799 F.2d 311. A timely petition for rehearing en banc was denied on October 1, 1986. A-33.

2. Facts:

A. A-C'S CONDUCT.

In late 1981, with a collective bargaining agreement in place and not set to expire until November 1, 1982, A-C notified the Union that it sought

concessions in the then-existing collective bargaining agreement, both with respect to wages and benefits. Roznik Aff. paragraph 2; Collins Aff. paragraph 14. The Union rejected the demands for concessions pointing out that A-C was profitable at the time and rejecting the claim that labor costs were out of line for the industry. Collins Dep. at 10-13.[2]

A-C stated directly to employees in late 1981 and early 1982 its desire to achieve cost reductions through retirement benefits cuts.[3] As early as

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2. This deposition, along with several others cited throughout this petition, were made part of the record as attachments to the affidavit of Robert C. Angermeier. A-44. Depositions of Kern, Roznik and Equitz, each spanned two days so that references to those depositions indicate which day - the first or second - was involved.

3. From October, 1981 through February, 1982, A-C management conducted what the Union characterized as a "propaganda campaign" during which A-C

the spring of 1982, A-C learned, by conducting studies, that its announced desire to seek cuts in pension and health benefits would result in extensive retirements of older workers with 30 or more years of seniority, all of whom were within the age group protected by ADEA, so that employees

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attempted to directly convince the employees that labor costs were excessive. Collins Aff. paragraph 21. A-C communicated its desire for reductions in the area of retirement benefits directly to employees in mandatory meetings called in November and December, 1981. Equitz Dep. II at 4-6, 10. A -36, -42. (The affidavit of Plaintiff Monar is virtually identical to that of all other plaintiffs in paragraphs 1 - 6.) A-C also sent directly to each employee correspondence dated February 3, 1982, signed by the president of the corporation, Wendell Bueche, which reiterated the demand for labor costs concessions and specifically identified the area of benefits as a target for reductions. A-60. When the company spoke of potential reductions in the area of benefits in this letter, it meant pension and health benefits. Equitz Dep. I at 21. Plaintiff's understood that this was the company's desire and intention as well. A-36.

could gain the retirement benefits of the existing contract. The anticipated levels of retirement fit A-C's plans for a declining work force.[4]

At the bargaining table, however, A-C never proposed modification or reduction of pension benefits and respecting health insurance, only proposed the addition of a co-pay

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[4]. In a report prepared by Dan Kern, manager of employee relations and communications for A-C on March 19, 1982, he projected that approximately 200 to 250 retirements could be anticipated by November 1, 1982, due to the fears of employees that there would be changes in pension and health benefits. An additional study was undertaken by A-C in April of 1982 to gauge the impact of that number of retirements which had been estimated by Dan Kern. That additional report included that retirements in the 200 to 250 range were preferable to A-C as it was in line with A-C's overall projections for a declining work force. The report was sent to A-C president, Wendell Bueche with copies to Howard Equitz and Dan Kern and others. Angermeier Aff., Exhibit 14; Equitz Dep. II at 14-15, 21.

feature. Equitz Dep. I at 21; Kern Dep. II at 25. At no time did A-C go back to the employees to tell them it had changed its position over what it had told them in the late 1981 and early 1982 communications. Equitz Dep. II at 3.

As the expiration of the collective bargaining agreement approached on November 15, 1982 (it had been extended by mutual agreement of the parties), and during the time it was clear that A-C would insist on work without a contract (a "window period"), A-C blocked every effort to disclose its true position to the work force - that it had no plans to modify pension and health plans and would give prior notice before doing so.[5] This was done with full knowledge

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[5]. A-C had no intention to exercise its unilateral right to make changes in retirement benefits during the period of work without a contract.

that such actions would lead to massive retirements. Kern Dep. I at 17;

Bueche Dep. at 15. In a meeting attended by upper management of A-C in early November, 1982, Dan Kern proposed issuing a statement to the employees which would have said that A-C had no imminent plans to modify retirement benefits and that if such changes were to be made, there would be advanced notice. Kern Dep. I at 120-23; A-55. Although this proposed statement was never issued by A-C because it was rejected by Howard Equitz and company president, Wendell Bueche for reasons other than its accuracy (bargaining leverage), Bueche Dep. at 27, Equitz Aff. paragraph 16 & 17, A-C was, through Daniel Kern, actually making such a statement directly to individual workers but A-C would not put the statement in writing. Collins Dep. at 91; Equitz Dep. I at 73-77. A-C also went so far as to refuse to let the Union issue a statement of A-C's true intention during the "window period" unless the Union would agree to hold A-C harmless, a liability the Union understandably would not accept. Collins Dep. at 95. This establishes both what A-C's true plans were during the "window period" and that it blocked every effort to have those intentions communicated to the work force. On the other hand, A-C had no problem communicating directly with employees earlier its original (and by now abandoned) desire to effect retirement benefit cuts. See, note 3, supra.

Angermeier Aff. Exhibit 12 (b).

A-C knowingly fueled older employees' fears its previous actions had created of retirement benefit modifications (see, notes 3 and 4, supra) by annoucing to the work force on November 12, 1982, A-56 to 57 that it was offering work during the "window period" at the same wage rate, while deliberately remaining silent in that notification (and otherwise) concerning any other benefits it was actually continuing to offer workers. See, note 5, supra. This was a policy deliberately considered, adopted and implemented by A-C and which had both explicit (bargaining leverage) and implicit (declining work force) purposes.

In response to A-C's deliberate policy to make retirement eligible employees believe that retirement benefits would be cut or eliminated during the "window

period", there were approximately 300 retirement applications submitted (including those of the plaintiffs) in the 16 day period before the expiration of the collective bargaining agreement on November 15, 1982. Angermeier Aff. Exhibit 6, 7. This was approximately 64% of the retirement eligible employees. On November 15, 1982 alone, 216 individuals submitted retirement applications. Angermeier Aff. Exhibit 7. The average age of persons retiring on November 15, 1982, was 55.5 years. A-45. On the average, employees who retired effective November 15, 1982, had begun working for A-C in 1948; id.; none had begun working for A-C after 1953. Plaintiffs' Affs. paragraph 2. By contrast, the employees who were called to replace the retirees were, on the average, 36.7 years of age, and, on average, began working for A-C in 1970.

A-47, -48. The difference in age between the average retiree who retired on November 15, 1982, and the average employee who was called to replace that worker was 18.8 years. None of the younger employees who were not eligible for early retirement[6] refused to work during the "window period".

Negotiations continued beyond

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[6]. The retirement and pension plan provided employees with 30 or more years of service to the company the ability to retire and enjoy a monthly pension payment as well as a comprehensive medical insurance benefit plan. Equitz Aff. Exhibit 1 at 90. The benefits which a retirement eligible employee risks losing were substantial; considering health benefits alone, it would have cost an individual age 55 and a dependent spouse, $4,062.86 to obtain annual medical insurance coverage in 1983; in a comparable period in 1984, a person aged 55 would spend $5,298.58 for annual medical insurance; these plans would not include the dental and eye care which the A-C plan included. Derrenne Aff. In addition, an average employee risked the loss of approximately $3,600 in supplemental pension benefits annually until age 62. The "basic pension" was not at risk because it was vested.

November 15, 1982, between A-C and the Union. During the period between November 15, 1982 and November 30, 1982, employees who had retired were permitted to withdraw their applications, Equitz Aff. paragraph 18, but without receiving any new or different information than had been communicated to them by A-C prior to November 15, 1982. Only 61 persons rescinded their retirement applications and returned to work during this period. A-4; 799 F.2d at 313.

Although at the expiration of the collective bargaining agreement and thus during the "window period" A-C had the power to alter the pension plan or even discontinue it pursuant to Sec. 10.1 of the Retirement and Pension Plan, Equitz Aff. Exhibit 1 at 114 - 15, the plaintiffs and the other retirement eligible employees who actually decided to retire on or before November 15,

1982, did so not because A-C simply had the power to make changes in retirement benefits but because A-C's direct communications with employees had led them to believe that it was probable that A-C would in fact exercise this power, directly contrary to A-C's true plans to continue such retirement benefits unchanged through the "window period". Plaintiffs in their affidavits put it this way:

> Based on the company's conduct in 1982 [referring to, among other things, the company's November 12, 1982 notice regarding work during the window period which was silent about pensions and medical benefits] and in particular its stated desire to cut costs by reducing benefits, I believed there was a real possibility that the company would do so after the contract expired. I could not risk the financial well being of myself and my dependents by continuing my employment under the circumstances created by the company.

A-38 to -39. (emphasis added).

B. THE UNION'S CONDUCT.

Plaintiffs have asserted that the Union's liability attaches for their conduct after November 30, 1982. Second Amended Complaint. Within a 30 day period immediately preceding November 15, 1982, one-third of the Union's active employed members had retired under conditions which the Union had complained were coercive. Angermeier Aff. Exhibit 15 & 12(b).

At a Union membership meeting in early December, at least one recent retiree spoke from the floor and urged the Union to "negotiate with A-C to try and get my job back." She indicated that her retirement was not voluntary. Plaintiff West Aff. paragraph 10. It was understood that West's request was on behalf of all the retirees. A-41 to-42. At that meeting, when asked "can you negotiate us back?" Union president

Roznik replied "Yes, I will try." Roznik understood that various older workers wanted simply to get back to work and they wanted the Union to negotiate their jobs back just like any other time. Roznik Dep. I at 145-46.

Despite the fact that the Union had seen over 300 of its active members submit early retirement applications in the sixteen days immediately preceding November 15, 1982, under circumstances the Union acknowledges as coercive, the Union failed to follow through on its assurances that it would negotiate to get the retirees back by engaging in substantial or vigorous bargaining to return those members to the work force: The Union raised the issue of November retirees at collective bargaining sessions on only two occasions after December 1, 1982; Roznik Dep. I at 153; the discussion was brief, approximately

5 to 10 minutes; Id. at 155; the company was not interested in the subject; Roznik Aff. paragraph 17; Mr. Kern of A-C did not recall the subject being brought up at all in negotiations; Kern Dep. II at 30. From the outset of post-November 30, 1982 bargaining, the Union leadership indicated that the interests of older workers were expendable; Union president Roznik stated in early December that he had to be more concerned with younger workers with 7 years seniority than older workers who had vested pension rights. Monar and West Affs. paragraph 8; A-41.

The Union was also willing to trade off the interest of older workers for its own institutional interests; this was in connection with the dismissal of N.L.R.B. charges against the company (charges which included an allegation of forced retirements). Collins Aff.

Exhibit 7, at 9-10. Also involved in the N.L.R.B. charges was the allegation that A-C was unlawfully contracting out work to subcontractors and to other non-union and non-UAW facilities; the Union was able to obtain concessions in bargaining in late January where A-C agreed that tractor production would remain in West Allis. Collins Aff. Exhibit 8. Yet this did not resolve all of the issues surrounding the pending N.L.R.B. charges, especially the forced retirement issue. Rather than bargain for the forced retirees at this point, the Union injected a completely colatteral concern of the International UAW: The recognition of a previously unrecognized bargaining unit at Batavia, Illinois; the issue of the recognition of the Batavia unit was not a part of the N.L.R.B. charges at issue; rather this was a separate and long standing

dispute between A-C and the International Union which related to a disputed election which was held years earlier and was already in the courts. Shoemaker Aff. paragraph 7. The Union injected the recognition of the Batavia unit as the negotiations were about to conclude. Id., paragraphs 8-9. The Union offered to drop the N.L.R.B. charges which included the forced retirement charge in exchange for recognition of the Batavia unit. Id., paragraph 9. The company accepted and a new contract was reached. The tentative collective bargaining agreement was ratified on Sunday, February 6, 1983. On February 7, 1983, the Union requested that the N.L.R.B. withdraw the unfair labor practice charges.

REASONS FOR GRANTING THE WRIT

I. A-C DID TAKE ACTIONS WHICH CAUSED THE RETIREMENTS OF PLAINTIFFS IN VIOLATION OF THE ADEA.

A brief overview of the circumstances and impact of the Seventh Circuit's decision is in order. This case arises in a context which is sadly being repeated throughout this country. We are inundated with accounts of manufacturers in this country who, in an effort to compete in an evolving world market and a flood of cheaper foreign goods, are forced to seek both concessions from union workers in wages and benefits, and to eliminate jobs altogether. This Court is faced with a serious question of the propriety of employer conduct likely to recur in a variety of comparable contexts. The essential question is this: Will the ADEA be read to countenance the acts of an economically troubled employer which,

for purposes of bargaining leverage and work force reductions, deliberately misleads its retirement eligible work force into believing that they must choose between sacrificing benefits earned through 30 years of loyal service in order to continue working, a choice not imposed on younger workers. Unless the Seventh Circuit's approval of such conduct in this case is reversed, other employers in a similar economic dilemma will feel free from ADEA concerns to effect work force reductions and to attempt to gain bargaining leverage solely at the expense of older workers simply because they, not younger workers, have worked long enough to have something to lose -- earned retirement benefits.

In affirming the District Court's grant of summary judgment to A-C, the Seventh Circuit Court of Appeals relied

upon a single concept to reject the imposition of ADEA liability both for purposes of a disparate impact and a disparate treatment analysis. The Court of Appeals started with the premise that when the collective bargaining agreement expired, A-C had the right to modify its retirement benefits. According to the Court of Appeals it was this right, viewed in isolation, and without regard to any of the actions taken by A-C to lead employees to believe that exercise of that right would be probable that caused the flood of retirements in November, 1982, including those of the plaintiffs. A-6, -7. The Court used this view of the facts to conclude that there had been no constructive discharge because nothing that A-C did made plaintiffs' working conditions intolerable, A-6, that no employment practice of A-C had caused a disparate

impact on A-C's older workers, id.; and that no legal duty arose for A-C to declare its intention about retirement benefits during the "window period", id. at 7[7]. 799 F.2d at 314-15.

Viewed as an improper weighing of conflicting facts (the Court of Appeals view that plaintiffs were motivated to retire by the simple existence of the

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7. This was the only way in which the Seventh Circuit found fault with any of plaintiffs' theories of ADEA liability. For disparate impact purposes A-C never offered a business necessity defense. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). Under the indirect disparate treatment theory of McDonnell-Douglas v. Green, 411 U.S. 792 (1973) plaintiffs (1) were in the protected age group (2) were qualified to continue employment and (3) were replaced by younger workers. Finally, for purposes of direct evidence of discriminatory disparate treatment under TWA, Inc. v. Thurston, ___ U.S. ___ 105 S.Ct. 613, 625 (1985) employment practices based on an employee's status as retirement eligible are age discriminatory. EEOC v. Borden's Inc. 724 F.2d 1390, 1393 (9th Cir. 1984): EEOC v. Westinghouse Electric Corp., 725 F.2d 211, 222 (3d Cir. 1983).

power of A-C to modify retirement benefits versus the plaintiffs' stated view that it was the actions of A-C in misleading them into believing that this power would actually be exercised during the "window period") the Seventh Circuit's opinion runs squarely afoul of this Court's long standing view that on a motion for summary judgment it is improper to essentially conduct a trial by affidavit. See, e.g., Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 472-73 (1962).

Another view of the Seventh Circuit's opinion and reasoning process must also be explored, however. It may very well be that the Seventh Circuit Court of Appeals felt that the dominant reason for the plaintiffs' action in retiring were the circumstances which were out of the control of A-C (the expiration of the collective bargaining agreement and

with it, the inherent uncertainty whether A-C would exercise the power it reserved to modify, eliminate or reduce retirement benefits following the expiration of the collective bargaining agreement) rather than the plaintiffs' stated reason which focused upon the acts of A-C (the repeated actions of A-C in its statements directly to employees which created the reasonable belief that it would, indeed, change those benefits during the "window period" even though its intentions in that regard had changed). Assuming this to be the case,[8] the Seventh Circuit's opinion effectively holds that considering the existence of both discriminatory acts of

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[8]. The Seventh Circuit's opinion does take note that A-C's desire for concessions in wages and benefits was communicated directly to the employee population as a whole, A-2, and that A-C had announced that work during the window period would be at the old contract's wage rate, A-3.

A-C and other nondiscriminatory circumstances the contribution of A-C's acts was not sufficient to violate the terms even of 29 U.S.C. Sec. 623(a)(2). First, such a ruling squarely conflicts with this Court's decision in TWA, Inc. v. Thurston, ____ U.S. ____, 105 S. Ct. 613 (1985). Secondly, as will be seen below, such a view of ADEA liability also conflicts with the broad statutory provisions embodied in 29 U.S.C. Sec. 623(a)(1) and (2), which were taken in haec verba from Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-2(a)(1) and (2). Lorillard v. Pons, 434 U.S. 575, 584 (1978). Thirdly, the Seventh Circuit's line of reasoning conflicts with several other courts of appeals opinions applying the ADEA.

The opportunity for work during the

"window period", created by A-C[9] brought into play the principles of Thurston, 105 S. Ct. at 621, which observed:

> The act does not require TWA to grant transfer privileges to disqualified captains. Nevertheless, if TWA does grant some disqualified captains the "privilege" of "bumping" less senior flight engineers it may not deny this opportunity to others because of their age.

Here, the period of work itself was an employment "opportunity" bringing with it the duties imposed by 29 U.S.C. Sec. 623(a)(2) for A-C not to take any action which would "deprive" or "tend to deprive" older workers of the employment opportunity. Were the existence of the opportunity alone not enough to bring into play the duties under Sec.

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9. Once the Union decided not to strike when the contract expired it was A-C's choice alone to either lock out employees or offer continued work. Stokely-Van Camp, Inc., 186 N.L.R.B. 440 (1970); Iron Molders Union v. Allis-Chalmers, 166 F.2d 45, 52 (7th Cir. 1908).

623(a)(2) and Thurston, A-C took a further step on its own by attempting to induce employees to take advantage of the "window period" opportunity for work it was offering. A-C chose to tell the employees some but not all of the terms of employment -- just the wages. Like the benefit of transfer rights in Thurston, A-C may not have had to tell its employees what any of the terms of employment would be[10], but once having

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[10]. Ordinarily the principle that a union is the exclusive bargaining representative of employees means that the union bears the burden of communicating with the work force. However, exceptions exist where the employer may communicate directly with the employees. E.g., N.L.R.B. v. Bradley Washfountain Co., 192 f.2d 144 (7th Cir. 1951); Procter & Gamble Mtg. Co. (Port Ivory), 160 N.L.R.B. 334 (1966).

On the specific subject here, A-C refused to let the Union tell employees that the terms and conditions of "window period" work would also include, in addition to the same wages, also the same benefits. See, note 5, supra.

undertaken to do so, A-C certainly could not withhold the disclosure of some of those employment terms in a way which would "deprive" or "tend to deprive" older workers of the employment opportunity in violation of the ADEA. Yet, that is what was knowingly done by A-C. By telling employees only that wages would remain the same, A-C successfully induced all of the non-retirement eligible workers to come to work while 64% of the retirement eligible workers did not come to work.[11]

Moreover, viewing the Seventh Circuit's reasoning as excusing A-C from the steps it took to fuel older employee fears of benefit changes which might have existed in the abstract in any

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[11]. Substantially lower percentages in disparate impact cases have been recognized to support a conclusion of discriminatory disparate impact under Title 7. Dothard v. Rawlinson, 433 U.S. 321, 330 n.12 (1977).

event, such action amounts to a failure by the Seventh Circuit Court of Appeals to apply the broad language of 29 U.S.C. Sec. 623(a)(2) so as to recognize an appropriate imposition of liability. This Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971) squarely stated that the comparable provisions of Title VII contained in 42 U.S.C. Sec. 2000e-2(a)(2) indicated a congressional mandate to attach liability even to the unintentional consequences of employment practices. Id. at 432. The Court had no difficulty finding that "[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute." Id. at 429. The Court went on to observe in language particularly applicable in this case that "Congress has now required that the posture and condition of the job seeker be taken into account." Id. at 431. A

further indication of the broad construction accorded the language contained in 42 U.S.C. Sec. 2000e-2(a)(2) is set forth in Connecticut v. Teal, 457 U.S. 440, 451, 453, 455 (1982), where the court repeatedly emphasized that it was employment "opportunty" which Congress sought to protect from unnecessary employer created barriers. Accordingly, for the Seventh Circuit to effectively say that whatever A-C did, it did not, at the least take steps to "tend to deprive" older workers of the employment opportunity during the "window period", amounts to an unduly narrow construction of the broad provision of 29 U.S.C. Sec. 623(a)(2) which were taken in haec verba from comparable provisions of Title VII. This Court simply has not yet faced in any of its Title VII or ADEA cases the broad construction of the language which

should be afforded to the proscription against any employer action which even "tends to deprive" older employees of employment opportunities such as was done in this case. However, in Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985) where the court, in dealing with a mixed motive case (where, like here, both discriminatory and non-discriminatory reasons arguably are factors in an employment decision) concluded that the broad language of 42 U.S.C. Sec. 2000e-2(a)(2) required a finding that employment discrimination had occurred because employer actions "tended to deprive" an employee of a promotion opportunity, even though the employee would not have actually received the job absent the race discrimination. The Seventh Circuit's opinion in this case

is clearly to the contrary.[12]

Finally, the Seventh Circuit's refusal to find liability in this case runs squarely contrary to those courts from other circuits which have held that limiting or classifying employees for purposes of benefits on the basis of retirement eligibility is age discriminatory. EEOC v. Borden's, Inc., 724 F.2d 1390, 1393-94 (9th Cir. 1984); EEOC v. Westinghouse Electric Corp., 725 F.2d 211, 222-23 (3d Cir. 1984). Similarly, the Seventh Circuit's opinion

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12. This case is not nearly as close a question of the relative effects of mixed discriminatory and nondiscriminatory acts. The plaintiffs squarely identified A-C's previous direct statements to them in late 1981 and early 1982 of a desire for retirement benefit cuts (which were never corrected when A-C's intentions changed) plus, the announcement of A-C only that wages would remain the same during "window period" work as the reasons they believed, contrary to A-C's true intentions, that A-C would effect benefit cuts during the window period. A-38 to -39.

in this case contradicts the ruling in Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981) where the court found that an employer's policy of hiring teachers below a certain experience level had a disparate impact on older workers due to a high correlation between experience and age. The same is true concerning Leftwich v. Harris-Stow State College, 702 F.2d 786 (8th Cir. 1983), where the court found that an employer's policy of reserving certain faculty positions for previously untenured teachers had an unlawful disparate impact upon older workers due to a high correlation between age and previous tenure.

II. THE UNION'S CONDUCT IN SACRIFICING THE INTERESTS OF THE FORCED RETIREES IN THE COLLECTIVE BARGAINING PROCESS WAS AGE DISCRIMINATORY.

Like the resolution of employer liability, the Seventh Circuit ran afoul

of the principles of Poller, supra, when it effectively resolved conflicting affidavits in the context of the summary judgment motion. Although the Seventh Circuit observed in its opinion that two of the plaintiffs had reported that Union president Roznik had told him his reason for Union inactivity on behalf of the retirees was because he was more concerned with younger workers who had no vested pension rights, A-8, -9, the Court went on to credit Roznik's Affidavit which explained his actions were for different, non-discriminatory reasons. Instead of recognizing that the accounts of the plaintiffs and those of Union president Roznik were mutually inconsistent, the Seventh Circuit attempted to harmonize the two differing accounts. Indeed, the Court chose to entirely credit Roznik's account and to effectively disregard those statements

made to Plaintiffs Monar and West. The Court said:

> At most, these statements [referring to the combination of Monar, West and Roznik accounts] show that the Union negotiators were attempting to advance many competing concerns. . . .
>
> . . . Roznik's decision that plaintiffs' cause was lost and that more could be done for other workers was no an act of age discrimination when viewed in the context of collective bargaining on a full slate of employment issues and in the absence of statutory rights. The Union's duty in this case were conflicting, and its resolution, at least as expressed by its local's president, reflect a pragmatic accounting of all relevant facts and factors rather than a decision to "dump" workers perceived to be of less value

A-9, -10 (Emphasis added.). What the Court ignored was the fact that when Roznik spoke to Plaintiffs Monar and West, he offered none of his four non-discriminatory reasons for the Union's conduct. Viewing the statements of Monar and West alone, as Poller would direct, such statements clearly evidence

discriminatory intent since they manifest a desire to draw distinctions between those employees who are retirement eligible from those who are not for purposes of obtaining the benefit of Union representation in the bargaining process. Distinction on this basis is age discriminatory. EEOC v. Borden's, Inc., 724 F.2d at 1393; EEOC v. Westinghouse Electric Corp., 725 F.2d at 222-23.

The effect of the Seventh Circuit's ruling is not only to fail to give sufficient breadth to the prohibition against Union conduct which "tends to deprive" older employees of employment opportunities contained in 29 U.S.C. Sec. 623(c)(2), but also to run afoul of the Seventh Circuit's own decision in Babrocky v. Jewel Food Co., 773 F.2d 857 (7th Cir. 1985) which imposed Title VII liability upon a union for not

protesting vigorously enough an employer's discriminatory practices. Similarly, the Seventh Circuit's opinion conflicts with the decision in Carey v. Greyhound Bus Co., Inc., 500 F.2d 1372 (5th Cir. 1974) where the court found the union jointly liable with the employer because the union could have taken affirmative steps to initiate negotiations with Greyhound in an effort to salvage for the union's ex-members, seniority that they inevitably and forseeably would lose upon being bumped from positions in a unit represented by another union. That court found the union liable even though the court recognized that such a step might have proved unavailing. Id. at 1379.

CONCLUSION

Quite apart from the effective conflicts which exist between the Seventh Circuit's opinion in this case

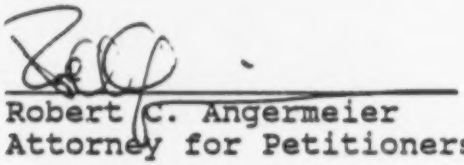
and the decisions of other circuits, this Court has recognized that it is appropriate to grant certiorari to decide whether lower courts have properly applied its most recent pronouncements (here, Thurston). Nashville Gas Co. v. Satty, 434 U.S. 136, 138 (1977). Further, this Court can address the disturbing trend in employment discrimination litigation noted by Judge Sweigert in a dissent as to the inappropriate use of summary judgment and as to disposition of cases which blunt the broad construction of employment discrimination rights initially set forth in Griggs v. Duke Power Co., supra, Fox v. A & P Tea Co., 772 F.2d 1372, 1381-82 (7th Cir. 1985).

Finally, review by certiorari is appropriate so that this Court may clarify, for purposes of the ADEA as well as the comparable language of Title

VII, the heretofor unexplained breadth of the prohibition against employer actions which "tended to deprive" employees of employment opportunities in a context where employer action combines with circumstances out of its control to limit employee opportunities.

For the foregoing reasons the petitioners respectfully ask that this Court grant the writ and review the Seventh Circuit's opinion in this case.

Respectfully submitted,



Robert C. Angermeier
Attorney for Petitioners

APPENDIX

The Appendix to this Petition, because it is voluminous, is set forth separately.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 1986, three copies of the Petition for Writ of Certiorari and Appendix to Petition for Writ of Certiorari were mailed, postage prepaid, to:

Ms. Miriam Horwitz
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and,

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I further certify that all parties required to be served, have been served.

Robert C. Angermeier
Attorney for
Petitioners.

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86-1117

Supreme Court, U.S.
FILED
DEC 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

RAYMOND BARTMAN, et al.,

Plaintiffs,

v.

ALLIS-CHALMERS CORPORATION, INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE, et al.,

Defendants.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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December 30, 1986

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In the

United States Court of Appeals

For the Seventh Circuit

No. 85-2372

RAYMOND BARTMAN, et al.,

Plaintiffs-Appellants,

v.

ALLIS-CHALMERS CORPORATION, INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and LOCAL 248—UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 83 C 435—Terence T. Evans, *Judge.*

ARGUED FEBRUARY 10, 1986—DECIDED AUGUST 20, 1986

Before BAUER, FLAUM and EASTERBROOK, *Circuit Judges.*

BAUER, *Circuit Judge.* Appellants are sixty-five former employees of Allis-Chalmers Corporation. In 1983 they filed this law suit under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623 *et seq.*, seeking damages and reinstatement and naming Allis-Chalmers ("A-C") and their union, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Local No. 248 ("the Union") as defen-

dants. The district court granted defendants' motions for summary judgment, and this appeal followed. We affirm.

I.

Summary judgment is properly granted only if it appears "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. In determining whether any issues of material fact are in dispute, the inferences drawn from the record must be viewed in the light most favorable to the non-moving party. *Rodeo v. Gillman*, 787 F.2d 1175 (7th Cir. 1986); *Janowiak v. City of South Bend*, 750 F.2d 557, 559 (7th Cir. 1984). We have frequently noted that summary judgment may be inappropriate where motive or intent are at issue, as is often true in discrimination cases. *See, e.g., Stumph v. Thomas & Skinner, Inc.*, 770 F.2d 93, 97 (7th Cir. 1985).

In reviewing a summary judgment this court must view the whole record, and must reverse if it is revealed that inferences concerning material facts contrary to those of the trial court may be drawn. *Powers v. Dole*, 782 F.2d 689, 694 (7th Cir. 1986). We are not, however, required to draw every *conceivable* inference, but only those that are reasonable. *Matthews v. Allis-Chalmers Corp.*, 769 F.2d 1215, 1218 (7th Cir. 1985); *Parker v. Federal National Mortgage Association*, 741 F.2d 975, 980 (7th Cir. 1984).

Viewed in accordance with these principles, the record discloses the following undisputed facts: A-C is a manufacturer of farm implements headquartered in the Milwaukee area. In late 1981 and 1982, during a period of substantial financial losses, A-C informed the Union that it wanted to open negotiations to seek concessions in the collective bargaining agreement then in force, which was scheduled to expire on November 1, 1982. A-C planned to ask for concessions on wages and benefits, and this desire was communicated to Union officials and to the employee population as a whole.

Negotiations actually began in October of 1981 and continued intermittently until July 31, 1982, when they were temporarily suspended due to lack of progress. As the expiration date of the old contract neared, certain A-C employees became concerned about the status of their retirement benefits under the company's Pension Plan, an agreement separate from the contract but set to expire on the same day. Among these employees were plaintiffs, who at the time were eligible to retire immediately under the "early retirement" provisions of the Pension Plan. The Plan made early retirement available to those with 30 or more years of service at A-C. Plaintiffs were not worried about the sufficiency of benefits under whatever new contract would be negotiated; rather, their concern centered on any "window" period between the expiration of the old contract and Pension Plan and ratification of the new ones.[1] A-C management, anticipating these concerns, had projected an increase in early retirements as the expiration date approached.

As the November 1 deadline neared it became clear that no new contract would be agreed upon before the old one expired. A-C and the Union, having resumed negotiations, first agreed to an extension of the old contract until November 15. When even this period proved insufficient, the company and the Union announced that work would be available for all employees at the old contract's wage scale. (A-C remained in operation under those conditions until a new contract was negotiated on January 24, 1983 and ratified on February 6.)

In the weeks before the expiration of the old contract, concern among retirement-eligible employees about the future of their pension benefits mounted. At least two persons in A-C management suggested issuance by the company of a statement that would include a promise to give employees advance warning of any benefit plan changes;

[1] Actually, upon expiration of the Pension Plan A-C had the right to unilaterally suspend, continue or modify the Plan.

this would have assured retirement-eligible employees of the opportunity to work as long as possible without actually risking their benefits, which is exactly what plaintiffs wanted to do. The Union also brought up the possibility of a statement in its negotiations with A-C in November of 1982. Ultimately A-C declined to issue such a statement.[2]

A substantial number of eligible employees, including plaintiffs, retired just before the expiration of the old contract. However, A-C did allow those retiring during November of 1982 to rescind their retirements and return to work by November 30 without loss of seniority, and some did so. A total of 320 employees retired between October 31 and November 15, not including 61 who elected to rescind their retirements and go back to work before the end of November.

Negotiations continued after the old contract expired. Plaintiffs asked the Union to raise the subject of their retirements, which they had come to view as "forced," in those negotiations. The subject was raised at bargaining sessions in December, 1982 but A-C refused to give in on the issue. In January of 1983 the General Counsel of the National Labor Relations Board moved to add charges related to the retirements to unfair labor practice charges already pending against A-C concerning its conduct in bargaining in 1982. When the new contract was finally ratified in February of 1983, the NLRB charges were dismissed as part of the contract settlement.

II.

In granting A-C's motion for summary judgment, the district court concluded that plaintiffs could not make out

[2] The record indicates that Dan Kern, Director of Employee Relations for A-C, responded to several individual employees' inquiries by stating that A-C had no imminent plans to change benefits and that the Union would be advised prior to any such changes. This statement was never formally issued by A-C.

a *prima facie* case of age discrimination because they could not show that they were "constructively discharged." The court found that plaintiffs' status was not made intolerable by any action on A-C's part, but rather by uncertainty about their future due to the imminent expiration of the contract. There resulted, in the court's words, "retirement decisions that, while agonizing, were voluntary." *Decision and Order* of July 31, 1985, at p. 8.[3]

Plaintiffs argue that the district court failed to analyze their case on a disparate impact theory, under which an employment practice that is neutral on its face is unlawful if in fact it has a disproportionate impact on a protected group, in this case older workers. *See, e.g., Griffin v. Board of Regents of Regency Universities*, No. 84-2981, slip op. at p. 11 (7th Cir. June 18, 1986) (Title VII case). Plaintiffs note the unusually large number of early retirements in the days immediately preceding the expiration of the contract, which in their view demonstrates the necessary disparate impact. The "employment practice" plaintiffs challenge is A-C's decision to make work available during the "window" period at old contract rates, an "employment opportunity" neutral on its face but, as plaintiffs see it, impossible for older workers, *i.e.* those eligible for early retirement, to take advantage of

[3] The district court viewed plaintiffs' claim that A-C was obligated to publicly declare in advance its intentions with regard to the Pension Plan as presenting a potential conflict between plaintiffs' collective rights under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, and their individual rights under the ADEA. *See E.E.O.C. v. County of Calumet*, 686 F.2d 1249 (7th Cir. 1982). A-C argued in the district court that the requested statement would have constituted direct bargaining with a separate group of employees in derogation of its obligation to bargain with the Union. On appeal, though, plaintiffs make it clear that they were not concerned with what provisions the new contract and Pension Plan would hold, but rather feared the consequences of retiring during the "window" period when no contract was in force. Under this argument, then, no conflict arises between the two statutes, although the bargaining situation remains important in analyzing these facts.

without assurances that their retirement benefits would not be lost.

We agree with the district court's conclusion that plaintiffs have failed to demonstrate that their retirements amounted to constructive discharges by A-C. Contrary to plaintiffs' assertions in this court, the district judge was obviously aware that plaintiffs would have *preferred* to remain on their jobs, as is demonstrated by his sensitivity to the "agonizing" nature of the choices they faced. However, an employee is not constructively discharged whenever he elects to leave a job he would, on the whole, rather keep, without regard to the actual reason for his departure. An employer constructively discharges an employee only if it "*makes* an employee's working conditions so intolerable that the employee is forced into an involuntary resignation . . ." *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 926 (5th Cir. 1982), *quoting Young v. Southwestern Savings and Loan Association*, 509 F.2d 140, 144 (5th Cir. 1975) (emphasis added). In the instant case the condition that "made" plaintiffs' situation apparently intolerable to them was not any action of A-C, but rather the expiration of the Pension Plan, an event brought about by the failure of the contract negotiations and the passage of time. Plaintiffs have not argued, nor could they on this record, that A-C delayed the contract process in order to induce their retirements by allowing the plan to expire.

Another way to look at it is to say that plaintiffs have failed to present evidence that any action by A-C caused their departure. Proof that the disputed employment practice was the cause of the allegedly unlawful condition is a requirement of liability under a disparate impact theory. *E.E.O.C. v. Greyhound Lines, Inc.*, 635 F.2d 188, 193 (3rd Cir. 1980); *see also United States v. Town of Cicero*, 786 F.2d 331, 336 (7th Cir. 1986) (Posner, J., concurring and dissenting). Plaintiffs retired because they did not want to risk the loss of their pension benefits if they retired during the period between contracts. As observed above, the expiration of the contract was the cause of the "win-

dow" period. The extension of the "opportunity" to work without a contract did not change the status of plaintiffs' pension benefits; even if A-C had chosen to lock out the Union, the same danger of loss of benefits would have existed during the period between contracts.

The "employment practice" that is really at the heart of plaintiffs' argument is A-C's refusal to declare its intentions about pension rights in advance of the expiration of the contract. This argument must fail because there is no "act" by A-C involved; rather, plaintiffs complain about the absence of an act. We are aware that it might be possible in some cases to characterize positive acts in negative terms, but this is not such a case. A-C was not obligated to rescue plaintiffs from a predicament for which it was not responsible. To require it to do so would be to require A-C to treat older workers *better* than workers generally. The ADEA imposes no such obligation. *Tice v. Lampert Yards, Inc.*, 761 F.2d 1210, 1217 (7th Cir. 1985).

III.

To the extent plaintiffs' claims against the Union rest on its alleged acquiesence in A-C's conduct, those claims must fall in light of our disposition set forth in part II above. Plaintiffs also fault the Union for failing to pursue their reinstatement in the collective bargaining proceedings that took place after they retired and the old contract expired.

Plaintiffs correctly contend, as we held in *E.E.O.C. v. County of Calumet*, 686 F.2d 1249, 1256-57 (7th Cir. 1982), that a labor union may not, as part of the collective bargaining process, waive employee rights under the ADEA. *See generally Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974). As we have held above, though, plaintiffs' rights under the ADEA were not violated. Plaintiffs claim is more properly viewed as alleging that the Union breached its duty of fair representation by failing to obtain their reinstatement through the bargaining

process, and that this failure to bargain hard enough on their behalf was the result of the Union's view that, as older workers, they were more expendable.

In *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 868 (7th Cir. 1985), we held that employees alleging racial discrimination by their Union in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, could make out a *prima facie* case in the context of a breach of an existing collective bargaining agreement. Like Title VII, the ADEA is specifically applicable to labor organizations, 29 U.S.C. § 623(c), and we may assume (without deciding) that plaintiffs could state an ADEA claim against the Union based on failure to bargain with sufficient vigor. Nevertheless the record assembled below does not support plaintiffs' contention that the Union simply abandoned them because it felt that the interests of younger workers were more important. In fact, several hundred other A-C workers lost their jobs at the time of the 1982 negotiations as a result of plant closings and subcontracting of some of A-C's work outside the company. These job losses were among the subjects of the NLRB charges pending during the negotiations and dropped as part of the agreement on the new contract.[4]

Plaintiffs' principal evidence of the Union's intent to discriminate consists of statements allegedly made by Richard Roznik, president of the Union's Local 248 at A-C, to two of the plaintiffs, as well as statements made in Roznik's own affidavit filed in the district court. Plaintiff Elanor West stated that she heard Roznik tell a group of retirees that he "didn't have time to worry about 'your little problem' and that he was concerned about 'the guy with seven years that's on lay off.' " Plaintiff Al Molnar stated in his affidavit that Roznik suggested he take his

[4] As noted above, charges concerning plaintiffs' retirements were never formally added to those pending before the NLRB. The General Counsel's request to add those charges to the complaint was also abandoned when the agreement was reached.

complaints to the NLRB "as he was more concerned about the younger workers who had no vested pension rights." For purposes of this appeal we must assume that the plaintiffs' versions of Roznik's statements are accurate.

Roznik's own affidavit describes several incidents at bargaining sessions in November and December, 1982 in which Union negotiators attempted either (1) to get an extension of the period within which recently retired employees could rescind their retirements, or (2) to gain reinstatement for them. Although Roznik was not the chief negotiator, he did give four reasons why he did not thereafter continue to raise the issue of plaintiffs' retirements. These reasons included his conclusion that plaintiffs' retirements were voluntary, his desire to avoid further displacement of active workers as a result of any recalls of retirees, and his feeling that the Union had gotten all it could out of A-C (in the form of the contract extension and the November retirement rescission period).[5]

The first of these conclusions has turned out to be correct. The second is regarded by plaintiffs as concrete evidence of discrimination; coupled with Roznik's statements to West and Molnar, it is said to demonstrate that plaintiff's rights were discriminatorily subordinated to those of younger workers. We do not believe that this evidence will support such a conclusion. At most, these statements show that the Union negotiators were attempting to advance many competing concerns. Among these were plaintiffs' retirements which, as we have held, implicated no statutory rights. Absent a violation of law, the Union was not obliged to press plaintiffs' case at any expense.

[5] The Union argues initially that it had *no* obligation to bargain on behalf of plaintiffs because they were voluntary retirees. We need not reach the correctness of this argument because the Union *did* make efforts in their behalf, efforts which we find herein to have been made in a non-discriminatory manner.

The record reflects that the Union lost a lot of fights in the course of bargaining, and plaintiffs' was one of them. Roznik's decision that plaintiffs' cause was lost and that more could be done for other workers was not an act of age discrimination when viewed in the context of collective bargaining on a full slate of employment issues and in the absence of any statutory rights. The Union's duties in this case were conflicting, and its resolution, at least as expressed by its Local's President, reflect a pragmatic accounting of all relevant facts and factors, rather than a decision to "dump" workers perceived to be of less value.

IV.

The district court's. grant of summary judgment to defendants is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 6C054—Midwest Law Printing Co., Inc., Chicago—8-20-86—450

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RAYMOND BARTMAN, et al.,
Plaintiffs,

v.

CIVIL ACTION NO. 83-C-0435

ALLIS-CHALMERS CORPORATION, INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND LOCAL 248, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Defendants.

DECISION AND ORDER

This is an age discrimination lawsuit for damages and reinstatement brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 623, et seq. The plaintiffs, sixty-five former employees of the Allis-Chalmers Corporation's West Allis plant, allege that the company discriminated against them during the 1982 contract negotiations, in violation of the ADEA.

The plaintiffs have also sued their union, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and Local #248, claiming violations of the ADEA in connection with the same contract negotiations. The case is before me on the defendants' motions for summary judgment on the primary ground that the plaintiffs' allegations fail to state a claim under the ADEA.

Facts

The circumstances on which the plaintiffs ground their case comprise a rather sad chapter in the history of Allis-Chalmers, a farm implement manufacturer and one of the Milwuakee area's old bedrock companies. During 1981, the business was in substantial decline. It sustained a loss that year and predicted more red ink in 1982. On August 17, 1982, Allis-Chalmers

announced the elimination of certain diesel engine production lines and the removal of other work to another location. This caused the loss of 350 jobs. On August 21, 1982, the company made public its plans to lay off 550 additional workers in West Allis by the end of the year. Union officials suspected that Allis-Chalmers planned to move its operations out of West Allis altogether. The union initiated unfair labor practice proceedings in connection with the layoffs and work transfers. The plant's decline and eventual demise has been extensively reported in the local media.

It was in this gloomy atmosphere that the 1982 contract negotiations took place. The collective bargaining agreement then in effect was due to expire on November 1, 1982. Early on, the company notified the union that it

would seek concessions from its employees. The union rejected the company's claim that concessions were needed.

Negotiations occurred peridoically throughtout 1982, without success. As the November 1 expiration date loomed, both sides agreed to a 15-day extension of the contract to allow for further discussion. When it became clear that no agreement would be reached by November 15th, the union decided that its members would work without a contract rather than strike on the expiration of the bargaining agreement. (The union had struck the company eight times since 1950.) In a notice posted on November 12, 1982, the company stated that employees working without a contract would continue to be paid according to the old contract's wage scale.

Meanwhile, the plaintiffs -- all employees with thirty or more years with the company and therefore eligible for early retirement -- were increasingly concerned about their options in the event of a contract lapse. The contract negotiations in progress throughout 1982 included renegotiation of the pension agreement, which would expire with the contract on November 15, 1982.

Furthermore, in the atmosphere of uncertainty -- normal in all collective bargaining situations but heightened at Allis-Chalmers in 1982 due to the poor health of the company -- the plaintiffs' anxiety over what a new contract might contain was severe. As the plaintiffs saw it, they had a choice: retire before November 15 under the generous early retirement provisions of the old contract, or risk reductions of those benefits in the interim or under a new

contract. The plaintiffs chose the no-risk solution. All but one of the plaintiffs took early retirement. Plaintiff William Best took disability retirement.

Before they retired, however, the plaintiffs told the union of their fears. Before the contract lapsed, the union asked the company to divulge what changes, if any, it would make in wages and benefits it the ocntract expired. The company refused to discuss its intentions. The union asked for a written assurance that it would be given advance notice of any benefit changes so that retirement-eligible employees could retire at the old benefit level before the changes became effective. According to the plaintiffs' version of the story, the company and the union discussed the issuance of the following statement:

> There are no imminent

> plans to change pension and insurance. Before any changes would be made there would be discussion with the Union, and individuals would have an opportunity to retire prior to any change in the present benefits (Angermeier affidavit, Exhibit 12 (e)).

Allis-Chalmers refused to issue the statement, but decided to allow those employees who retired during November, 1982, to rescind their retirements before November 30, 1982 and return to work without loss of seniority. Without the above written assurance, the plaintiffs would not return to work. (Sixty-one other early retirees took advantage of the company's waiver of the rules and returned to work.) The plaintiffs were replaced by younger workers recalled from layoff.

Collective bargaining continued after the expiration of the contract. The plaintiffs wanted the subject of their

retirements -- which they looked upon as forced -- on the bargaining table. The union raised the subject during nogotiations, but not vigorously enough for the plaintiffs. On January 13, 1983, the General Counsel of the National Labor Relations Board (NLRB) moved to amend the union's pending unfair labor practice charges to include the issue of the "forced" retirements.

On January 24, 1983, tentative agreement on a new contract was reached. According to the plaintiffs, the agreement was brought about in part by the union's offer to drop the pending NLRB charges in exchange for recognition of the UAW at a previously unrepresented Allis-Chalmers plant in Batavia, Illinois. The new contract was ratified on February 6, 1983. The NLRB charges, which included the complaints of the plaintiffs, were dismissed. The

plaintiffs then filed this lawsuit.

Disucssion

The ADEA Provides:

Sec. 623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual whti respect to his compensation, terms, conditions, or privileges or employment, because of such individual's age;

. . .

29 U.S.C. Sec. 623 (a) (1).

The plaintiffs' case against Allis-Chalmers is based on the company's refusal, in the middle of collective bargaining, to issue a written statement of assurance to older workers that they would be notified in advance of any reduction in pension benefits and given an opportunity to retire at the old benefit level. The plaintiffs argue that this conduct had a disparate impact

on older workers or, alternatively, constituted disparate treatment of older workers, in violation of the ADEA.

In the plaintiffs' view[1], Allis-Chalmers' refusal to issue the statement was calculated to create "mass confusion" among older workers, to "gain leverage" over the union in negotiations, to "prey upon" older workers' fears about their benefits and confront them with a "Hobson's choice" which would undobtedly result in a massive reduction of the work force consistent with the company's need to trim manpower levels.

The plainfiffs' case against the union rests primarily on what the plaintiffs see as the union's acquiescence in the discriminatory conduct of the company.

---

1. While I must, on summary judgment, accept the plaintiffs' version of the facts, I need not accept their conclusions.

They argue that the union was more concerned about the fate of younger workers for whom pensions had not yet vested. The plaintiffs contend that the union "bartered" their rights away in exchange for recognition of the UAW at the Batavia plant.

Allis-Chalmers replies that the plaintiffs were essentially demanding a de facto extension of the contract, in circumvention of the collective bargaining process. The company argues that it simply could not have issued the statement the plaintiffs asked for, because it then would have been bargaining directly with one group of employees outside the collective bargaining process. Besides, the company argues, the plaintiffs all retired voluntarily, and therefore have no claim under the ADEA unless I construe their retirements as

constructive discharges. The union for the most part joins in the company's arguments.

I am sympathetic to the predicament in which the plaintiffs found themselves during the troubled 1982 contract negotiations. But I do not agree that the company's conduct, nor that of the union, was age discrimination. This case is problematical because it implicates the ADEA in a collective bargaining context. But I agree with Allis-Chalmers that to establish a prima facie case of age discrimination the plaintiffs must -- and are not able to-- show that they were constructively discharged.

In so concluding I am not unaware of the implication in this case of the rule that collective bargaining processes and agreements cannot ordinarily supersede individual rights to be free from

discrimination. EEOC v. County of Calumet, 686 F.2d 1249 (7th Cir. 1982). What happened in this case happened in the context of difficult and protracted contract negotiations. The conduct of the company and the union was governed by what each saw as its collective bargaining duty under the National Labor Relations Act (NLRA), 29 U.S.C. Secs. 151, et seq. Even so, the County of Calumet case held that where the prerogatives of the collective bargaining process collide with individual rights under the ADEA, the dictates of national labor policy are usually subordinate to individual rights. County of Calumet, supra, at 1256.

At issue in the Calumet County case, however, was a mandatory retirement age policy under which the plaintiff was literally forced to retire. In this

case, the plaintiffs seek to escape retirement decisions that, while agonizing, were voluntary. To make out a prima facie case of age discrimination in these circumstances, the plaintiffs must prove that tney were constructively discharged. Pena v. Brattleboro Retreat, 702 F.2d 322 (2d Cir. 1983); Caslin v. General Electric Co., 696 F.2d 45 (6th Cir. 1982); Downey v. Southern Natural Gas Co., 649 F.2d 302 (5th Cir. 1981); (the Seventh Circuit reserved judgment on this question in EEOC v. County of Calumet, 686 F.2d at 1256, n.5).

> The general rule is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved herein as if it had formally discharged the aggrieved employee.

Young v. Southwestern Savings & Loan

Assn., 509 F.2d 140, 144 (5th Cir. 1975).

The parties disagree on the requirement of intent among the elements of constructive discharge. Allis-Chalmers argues that the plaintiffs must prove not only that the employer intentionally created intolerable working conditions, but that it did so for the purpose of forcing the employee to resign. The plaintiffs argue that the employer need not have intended the resignation. Rather, they argue, the employer need only have intentionally created intolerable working conditions so that a reasonable person in the employee's shoes would have felt compelled to resign. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980).

The Court of Appeals for the Seventh Circuit has not addressed this question.

However, in Brown v. Brienen, 722 F.2d 360 (7th Cir. 1983), the court cited Bourque in connection with a reference in dicta to the constructive discharge doctrine. Brown v. Brienen, supra, at 365. While concededly without precedential effect, this reference could be taken as an indication of the court's inclination on the subject.

However, even under the lower standard of the Bourque case, there has been no constructive discharge here. Allis-Chalmers did nothing to make the plaitniffs' working conditions intolerable. If the plaintiffs' working conditions can be called "intolerable," they were made so by the fact of the imminent contract expiration, not any action on the part of the company, or the union, for that matter.

The plaintiffs have focused their argument on the company's refusal to

issue the written assurance about the pension benefits. However, the fact that Allis-Chalmers balked at issuing such a statement does not change the outcome here. To hold that it does imposes a duty on the company that it plainly does not have: the duty to make a separate agreement, in the midst of collective bargaining, with one group of employees to ward off a discrimination claim.

Furthermore, the record is clear that the plaintiffs retired based on their own speculation about what might happen in the future. If their situation was intolerable, then they were in the same boat as the workers who were not retirement-eligible, whose fears about the future of Allis-Chalmers were, if different, at least as great as those of the plaintiffs. To retire early was surely one reasonable response to the

dilemma. But that does not render their retirement choices involuntary.

Nor can I conclude that the union's conduct was discriminatory. The bulk of the plaintiffs' case against the union is based on its alleged complicity in the company's discrimination. Having already concluded that Allis-Chalmers did not discriminate, I must also conclude that, at least in this respect, the union did not discriminate.

As for the claim that the union "bartered away" the rights of the plaintiffs, it too falls short. The union was unsuccessful in negotiating the plaintiffs back into the work force. This does not make it guilty of age discrimination. The union dropped its unfair labor practice charges, including the charge involving the plaintiffs, in exchange for recognition of the UAW at the Batavia plant. The plaintiffs'

complaint, however, was only one of several NLRB charges then pending. The union put them all on the table, which was its prerogative as the plaintiffs' elected representative at the negotiations. All were dismissed upon ratification of the new bargaining agreement.

While the principle of majority rule in the bargaining unit is no excuse for discrimination, EEOC v. County of Calumet, 686 F.2d at 1256, I conclude from these facts that the plaintiffs were not singled out by their union because of their age. To conclude otherwise would be to hold the union to an unreasonable standard of success in negotiations: that of pleasing all its constituencies all the time.

The fundamental flaw in the plaintiffs' case is its assumption that the ADEA somehow exempts older workers

from the risks inherent in the collective bargaining process. This is simply not ture, and it would be improper for me to so extend the meaning of the ADEA.

For the foregoing reasons, the defendants' motions for summary judgment are GRANTED and this case is DISMISSED.

SO ORDERED at Milwaukee, Wisconsin, this 31 day of July, 1985.

BY THE COURT:

/s/

Terence T. Evans
United States District Judge

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Raymond Bartman, et al.,
v. 83-C-435
Allis-Chalmers Corporation,
et al.

Judge Terence T. Evans

__ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

XXX **Decision by Court.** This action came on for consideration before the Court with the judge named above presiding, and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
That defendants' motions for summary judgment are granted and this case is dismissed.

Clerk
Sofron B. Nedilsky
(By) Deputy Clerk
/s/
Regina J. Torcivia 7/31/85

JUDGMENT - ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, Illinois 60604

August 20, 1986
Before
Hon. William J. Bauer, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge

RAYMOND BARTMAN,et al,
Plaintiffs-Appellants,

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 83 C 435
Judge Terence T. Evans

No. 85-2372 v.

ALLIS-CHALMERS CORPORATION, INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND LOCAL 248 - UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Defendants-Appellees.

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, Division, and was argued by counsel.

On consideration whereof, IT IS

ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, Illinois 60604

October 1, 1986
Before
Hon. William J. Bauer, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge

RAYMOND BARTMAN,et al,
Plaintiffs-Appellants,

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 83 C 435
Judge Terence T. Evans

No. 85-2372 v.

ALLIS-CHALMERS CORPORATION, et al.,
Defendants-Appellees.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Mark J. Rogers, attorney for plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition for rehearing and suggestion for rehearing en banc. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing and suggestion for rehearing en banc be and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RAYMOND BARTMAN, et al.,
Plaintiffs,
v.

ALLIS-CHALMERS CORP., et al.,
Defendants.

AFFIDAVIT OF:
ALFONSO MONAR
Case No. 83-C-0435

STATE OF WISCONSIN)
)SS.
MILWAUKEE COUNTY)

Alfonso Monar, being first duly sworn, on oath states as follows:

1. That I am 51 years old, having been born on 9/8, 1932. I am a plaintiff in the above-entitled lawsuit.

2. I began working for Allis-Chalmers Corporation on or about June 6, 1952. I retired on Nov. 15, 1982. Although I had worked for 30 years and was eligible for early retirment [sic], I had not planned to retire at that time and had hoped to work at least several more

years, if possible.

3. From time to time in 1982, I heard statements from Allis-Chalmers complaining about what Allis-Chalmers claimed were high labor costs at the West Allis plant. Allis-Chalmers mentioned the area of benefits, not just wages, as an area of possible cuts. I don't recall the Company talking about the need to cut benefits during the year before earlier contracts were going to expire.

4. In the summer of 1982, it appeared at one time that the Union and Company were close to agreeing on a new contract. However, in late July, negotiations were broken off by the Company. After the negotiations broke down, unfair labor practice charges were brought against the Company. During the late summer and early fall of 1982, it was generally known throughout the West

Allis plant that there was talk that lots of work and machinery was being moved out of the West Allis plant, and that the Company might close down the West Allis plant. The media had reported on some Company documents showing possible plans to move the entire Tractor Division out of West Allis. The contract was set to expire on November 1, 1982, and that date was later extended to November 15, 1982. We learned there would not be a strike and that we would be expected to work without a contract. Several days before the contract expired the Company issued a statement that we were expected to report to work on November 16, 1982, and that we would be paid as under the old contract. However, the Company statement did not say anything about pensions and medical benefits. I understood that without a contract the

Company was free to make whatever changes they wanted in the supplementary pension and medical insurance benefits.

5. With no contract and with no definite word from the company about pension and medical benefits for retirees after November 15, 1982, I had no choice. I had to retire to be sure I would not lose supplemental pension benefits and medical coverage when I retired. I knew after there was no contract spelling out what the pension and medical insurance for retirees would be, the Company could make cuts in pension and cut or eliminate medical benefits for retirees, and I couldn't do anything about it. Based upon the Company's conduct in 1982 and in particular its stated desire to cut costs by reducing benefits, I believed there was a real possibility that the Company would do so after the contract

expired. I could not risk the financial well-being of myself and my dependents by continuing my employment under the circumstances created by the Company. If the Company at least would have said what pension and medical benefits for retirees there would be, if any, for people who worked after November 15th, I would have known where I stood. If they had told me that I would be told of any changes before they went into effect and that I would be given a chance to retire before the changes, if that turned out to be the best for me, I would not have retired. I probably would have kept working even if there were some cuts made in pension and medical benefits. I just needed to know about changes, with enough time to decide to retire because I wanted to, or because it was the right time for me and my family to retire. I knew if a new contract agreement was

reached, I woulf find out about what the new contract had in it for pension and medical benefits for retirees before the ratification vote. I could then decide whether to retire before those change went into effect or not. The problem wasn't what a new contract might have in it, the problem was the Company's refusal to tell me what the pension and medical benefits for retirees would be, if any, when there was no contract. I was not trying to hedge my bets on what cuts might have been made in pension and medical benefits for retirees in the new contract.

6. I would have returned to work after November 15, 1982, if the Company had told employees in writing that they would not institute changes in the retirement and benefits plan without first advising us of the proposed changes and giving us an opportunity to

retire first.

7. On November 30, 1982 I spoke with the president of my union, Richard Roznik about verbal statements which Dan Kern was allegedly making to certain employees. Mr. Roznik suggested that he could not be responsible for the company if the company was not putting their statement in writing.

8. I spoke with Mr. Roznik in early December, 1982 and he suggested that I go to the N.L.R.B. with our claim of forced retirement against the company. Roznik said that we should go to the N.L.R.B. ourselves as he was more concerned about the younger workers who had no vested pension rights.

9. At a union membership meeting in early December, 1982, Eleanor West made a statement to the union leadership that the union should bargain for the return of older workers who were forced to

retire.

10. I attended mandatory meetings in the early part of 1982 conducted by the company where the company showed us charts which purported to itemize the cost per hour to the company for our pension and medical benefits which the company claimed was too high.

11. On at least two occasions I attempted to see Mr. Kern at the employment office in order to question him regarding statements which he was purportedly making. I was not able to meet with him. Bernice Price had told me that the company would not put Mr. Kern's purported statement in writing, and I had wanted to confirm the statement with Mr. Kern.

/s/
Alfonso Monar

Subscribed and sworn to
before me this 7th day June,,
1984
/s/

Robert C. Angermeier

Notary Public, State of Wisconsin
My commission is perm.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RAYMOND BARTMAN, et al.,
Plaintiffs, Case No. 83-C-0435
v. AFFIDAVIT OF ROBERT C. ANGERMEIER
ALLIS-CHALMERS CORPORATION, et al.,
Defendants.

STATE OF WISCONSIN)
)SS.
MILWAUKEE COUNTY)

ROBERT C. ANGERMEIER, being first duly sworn, on oath deposes and states as follows:

1. That attached to this Affidavit, and indexed according to the named deponent, are copies of the actual depositions given in this action for the following individuals:

Daniel Kern
Wendell Bueche
Richard Roznick
J. Mitchell Senker
Bernice Price
Howard Equitz
John Collins

2. That based upon a review of the

computer printouts supplied by defendant Allis-Chalmers which provided the date of birth of employees in the workforce on 12/31/81, your affiant correlated the dates of birth with the 216 individuals who retired effective November 15, 1982, as indicated by the list supplied by Allis-Chalmers and marked and identified as Exhibit No. 10 in the Bernice Price deposition. Date of birth information was available for 94% of the 216 individuals sampled.

The average age of the person retiring effective November 15, 1982 was 55.5 years of age.

The same statistical analysis was performed to determine the average date of hire (seniority date) for individuals who retired effective November 15, 1982. The average date of hire for those persons was 1948.

3. Plaintiffs in this action

submitted interrogatories to defendant Allis-Chalmers, requesting them to identify by name, date of birth, and seniority the individuals who replaced each of the plaintiffs after the plaintiffs left the workforce in late October or early November, 1982. Defendant Allis-Chalmers responded that it was not possible to determine that information. As a result, a statistical analysis was done to identify the average age and the average date of hire for individuals who were recalled from layoff in the months immediately following November of 1982. Allis-Chalmers had previously indicated that the information requested concerning who was recalled to replace the workers who retired in late October or early November of 1982 would be contained in the transfer lists. Your affiant reviewed the transfer lists in queston

for the months following the disputed retirements and determined that the average seniority date for workers recalled form layoff during the relevant time periods are as follows:

November, 1982 recalls (85 in number), average date of hire 1971

December, 1982 recalls (27 in number), average date of hire 1971

January, 1983 recalls from layoff (246 in number), average date of hire 1969

February, 1983 recalls from layoff (214 in number), average date of hire 1971

4. A similar analysis was done concerning individuals recalled from layoff during the months following the retirements in issue by reviewing the transfer lists as well as the printouts supplied which indicated the year of birth for employees active in the workforce on 12/31/81. An analysis of those documents reveal that the average age of employees recalled from layoff as

follows:

November, 1982 recalls - average age 35.1

December, 1982 recalls - average age 34.9

January, 1983 recalls - average age 37.2

February, 1983 recalls - average age 36.9

March, 1983 recalls - average age 38.9

Average Age for Period November, 1982 through March, 1983 is 36.7.

A review of the seniority lists do not reveal the presence of anyone who quit or left the workforce on or near November 15, 1982 other than those who separated from the workforce due to retirements which indicates that individuals who were not retirement-eligible were willing to work without a contract.

5. At the beginning, in late December of 1982, plaintiffs in this action sent letters to Allis-Chalmers Corporation, a

copy of which is attached hereto, putting Allis-Chalmers on notice that they felt their retirement was forced and that they were willing to return to work on the condition that the Company would agree to advise retirement-eligible workers of any contemplated changes or modifications in the pension plan prior to the effective date of those changes. A copy of that letter is attached as Exhibit 1. These letters were sent on behalf of all plaintiffs at the same time the EEOC charges were filed. The procedure was modified slightly for the last plaintiffs to file EEOC charges whereby the letter or references in the letter were directed to the attorneys for Allis-Chalmers.

6. Attached as Exhibit 2 is a copy of the proposed Company statement identified by deponent Daniel Kern as Exhibit No. 5 in his deposition on May

26, 1983.

7. Attached as Exhibit 3 is a copy of a Memo to all employees dated November 12, 1982, which was identified by deponent Daniel Kern at page 100 in his deposition.

8. Attached as Exhibit 4 is a copy of a letter directed to Allis-Chalmers employees dated February 3, 1983, which was identified by deponent Wendell Bueche at page 9 of his deposition.

9. Attached as Exhibit 5 is a copy of a report prepared by Allis-Chalmers which indicates on page 4, in the spring of 1982, which reflects the number of retirement-eligible employees (463) as of November 1, 1982. This document was identified by deponent Daniel Kern as Exhibit No. 1 and identified by him at page 76 in his deposition.

10. Attached as Exhibit 6 is a listing of the individuals who retired

effective October 31, 1982. This list was prepared by Bernice Price and was marked as Exhibit 26 in her deposition.

11. Attached as Exhibit 7 is a listing of individuals who retired effective November 15, 1982. This list was prepared by Bernice Price and was marked as Exhibit 10 in her deposition.

12. Attached as Exhibit 8 is a listing of retirements by month from 1980 through 1982, prepared by Bernice Price and identified as Exhibit 25 in her deposition.

13. Attached as Exhibit 9 are newspaper articles appearing on August 19, 1982 and August 21, 1982, reflecting public statements being made by Allis-Chalmers Corporation at the time. these documents were produced by the defendant Unions on June 14, 1983.

14. Attached as Exhibit 10 are copies of the grievances filed by Raymond

Bartman as well as the group grievance filed by Casey Pendzik, copies of which were produced by Allis-Chalmers Corporation in discovery.

15. Attached as Exhibit 11 is a copy of the handwritten agreement between Allis-Chalmers and the United Auto Workers concerning recognition of the Batavia bargaining unit, in exchange for the dismissal of the NLRB charges, which included the forced retirement charge. This document was produced by the defendant Unions pursuant to a request for production on 6/10/83.

16. The following Exhibit 12 are excerpts of bargaining notes from collective bargaining sessions, prepared by various participants at those sessions:

(a) Exhibit 12(a) is a copy of the bargaining notes prepared by a Company representative at Central bargaining on November 5, 1982. This document was produced by Allis-Chalmers Corporation

pursuant to a request for production;

(b) Exhibit 12(b) is a copy of bargaining notes reflecting collective bargaining session on November 10, 1982, prepared by an Allis-Chalmers representative and produced by Allis-Chalmers pursuant to a request for production;

(c) Exhibit 12(c) is a copy of notes and Minutes of the November 24, 1982 meeting between Company and Union, prepared by a representative of Allis-Chalmers Corporation and produced by Allis-Chalmers Corporation pursuant to a request for production;

(d) Exhibit 12(d) is a copy of bargaining notes from the November 30, 1982 collective bargaining session prepared by a representative of Allis-Chalmers Corporation and produced by Allis-Chalmers Corporation pursuant to a request for production;

(e) Exhibit 12(e) is a copy of bargaining notes from a November 30, 1982 bargaining session prepared by Union representative Jeff Kosanke and produced by the defendant Union pursuant to a request for production;

(f) Exhibit 12(f) is a copy of bargaining notes from the November 3, 1982 bargaining session prepared by a representative of the Allis-Chalmers Corporation and produced by Allis-chalmers Corporation pursuant to a request for produciton.

17. Attached as Exhibit 13 is a copy

of a Stipulation demonstrating that the plaintiffs would still be working if they had not retired.

18. Attached as Exhibit 14 is a copy of a report prepared by Allis-Chalmers which gauges the possible impact of increased retirements leading up to November 1, 1982 which was identified as Exhibit 9 in the Equitz deposition.

19. Attached as Exhibit 15 is a copy of the December, 1982 "President's Report" by Richard Roznik.

/s/

Robert C. Angermeier

Subscribed and sworn to before me
this 11 day of June, 1984.

/s/

Mark J. Rogers
Notary Public, Milwaukee County, Wisc.
My Commission: is permanent.

JOINT COMPANY-UNION STATEMENT

The Company has informed the Union that, while it preserves any existing right to modify pay and benefit plans, it has no imminent plan to modify the pension plan or the hospital/medical insurance plan. The Company and the Union recognize that discussion will be held prior to the institution of any changes. Therefore, there would be advance notice of benefit plan changes and the employees would have opportunity to exercise their existing right under the current plan provisions.

Exhibit 2 Page 1

/s/

Kern Exhibit No. 5 5/26/83

Allis-Chalmers

MEMO TO EMPLOYEES

November 12, 1982

In October, Allis-Chalmers and United Auto Workers union representatives agreed to extend the current labor contract to November 15th. Talks between the Company and Union have continued since that time, but to date, have not produced agreements for represented production workers.

The contract will expire at midnight Monday, November 15th. further negotiations meetings are expected and will be scheduled by mutual agreement.

Employees of operations in production are expected to report, as usual, on November 16th, and thereafter are

expected to report in accord with existing work schedules. Wmployees will continue to be paid in line with current compensation programs.

Internal Communications

Exhibit 3 page 1

DISTRIBUTION: All West Allis Employees

ALLIS-CHALMERS

Milwaukee, Wisconsin 53201

WENDELL F. BUECHE
President and
Chief Operating Officer

February 3, 1982

Dear Employee:

This is to keep you informed about Company efforts to negotiate with the UAW for lower hourly labor costs in West Allis.

One part of this effort involves a labor cost reduction in the Foundry. On January 19, the Company gave the Union notice that failure to negotiate the needed labor cost reductions in the Foundry would result in the closing of that operation this year.

We have received notification from the Union that it cannot consider negotiating on the Foundry alone without involving other operations covered by

the present labor contract. Yet, the Union has indicated a willingness to meet with the Company. Because the Foundry is a separate problem, we had hopes of being able to negotiate this issue separately. If the Union feels that this is not possible, we will continue to seek negotiations to solve the problems of non-competitive hourly labor costs for the <u>entire</u> West Allis Complex.

This matter is of great importance to all of us, therefore we are willing to be flexible in the way the discussions with the Union are undertaken. While the Company needs to have progress in the effort to get cost reductions in all of the affected operations, it should be understood that the situation in the Foundry is of the most immediate concern. In its discussions with the

Union on January 19, the Company targeted 30 days for completion of talks on this matter. Failure to negotiate needed cost reductions promptly will result in a decision being made to close the Foundry.

If there is some confusion on just hos labor costs could be reduced, it should be explained that it has never been the Company's intention that these reductions would come only from employees' take home pay. we would prefer that cost reductions be made in the area of benefits as well, which are a very real expense to the Company but which employees do not see on their paychecks.

We are planning to keep you up to date with additional information to make sure that every affected employee fully

understands the situation.

Sincerely,

Wendell F. Bueche

Exh.4 page 1

Supreme Court, U.S.
FILED
JAN 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1117 (3)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

RAYMOND BARTMAN, *et al.*,
Petitioners,

v.

ALLIS-CHALMERS CORPORATION and
INTERNATIONAL UNION UNITED
AUTOMOBILE AEROSPACE & AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA, *et al.*,
Respondents.

On Petition for A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

BRIEF FOR ALLIS-CHALMERS CORPORATION IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

24 pp

QUESTION PRESENTED

Whether, in the circumstances of this case, the Court of Appeals properly held that Allis-Chalmers Corporation did not constructively discharge or otherwise discriminate against employees eligible for early retirement, and therefore did not violate the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621, *et seq.*

RULE 28.1 STATEMENT

Petitioner, Allis-Chalmers Corporation, is the only parent corporation. The following are the only subsidiary or affiliate companies of Allis-Chalmers Corporation:

AAF Heat Recovery, Limited

A-C Furesa Andina, S.A.

A-C Iberia, S.A.

Orissa Sponge Iron, Limited

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1117

RAYMOND BARTMAN, *et al.*,
Petitioners,

v.

ALLIS-CHALMERS CORPORATION and
INTERNATIONAL UNION UNITED
AUTOMOBILE AEROSPACE & AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA, *et al.*,
Respondents.

On Petition for A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF FOR ALLIS-CHALMERS CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-10) is reported at 799 F.2d 311. The decision and order of the United States District Court for the Eastern District of Wisconsin (Pet. App. 11-30) is unreported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 32-33) was entered on August 20, 1986. On October 1, 1986, the Court of Appeals denied a petition for rehearing and suggestion for rehearing *en banc* (Pet. App. 34). The petition for a writ of certiorari was filed on December 30, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Age Discrimination in Employment Act of 1967, as amended, "ADEA," 29 U.S.C. 621, *et seq.* The relevant statutory provisions are set forth in the Appendix to this brief.

STATEMENT OF THE CASE

The Court of Appeals affirmed the District Court's grant of summary judgment to Respondent Allis-Chalmers Corporation ("Allis-Chalmers") and Respondent International Union United Automobile, Aerospace & Agricultural Implement Workers of America and its Local 248 ("the Union"). Petitioners are a group of some fifty-seven former Allis-Chalmers employees who retired from Allis-Chalmers' employ in November 1982. Petitioners' complaint in the District Court alleged that Allis-Chalmers' failure to assure them that their retirement benefits would remain unchanged during collective bargaining negotiations between Allis-Chalmers and the Union in November 1982 "resulted in their constructive discharge" in violation of the ADEA. The complaint also alleged that the Union violated the ADEA by failing to obtain through collective bargaining with Allis-Chalmers an opportunity for Petitioners to rescind their retirements.

A. The Facts

1. Allis-Chalmers, a manufacturer of industrial equipment, has had a series of collectively-bargained labor contracts covering the production and maintenance employees at its West-Allis, Wisconsin, plant. Employees covered by the labor contracts were also covered by a series of separate Pension Agreements, likewise collectively-bargained between Allis-Chalmers and the Union. The Pension Agreements, the expiration dates of which coincided with the labor contracts' expiration dates, functioned to establish the Allis-Chalmers Pension Plan. Among other benefits, the Plan afforded Allis-Chalmers' employees an early retirement option, under which employees with 30 or more years of service could retire before age 62 and receive an unreduced retirement benefit, including a supplemental allowance. Although, by its terms, the expiration of a governing Pension Agreement did not automatically result in the termination of the Pension Plan, the Plan document itself gave Allis-Chalmers the right unilaterally to modify, suspend, or discontinue the Plan upon the expiration of the applicable Pension Agreement (Pet. App. 2-3; Equitz Aff.—S/J Mot.).[1]

2. During 1981, the business of Allis-Chalmers was in substantial decline. A net loss was sustained in 1981 and substantial additional losses were anticipated for 1982 (Pet. App. 12). In these circumstances, Allis-Chalmers announced that it would seek concessions on wages and benefits from the Union, and requested the Union to open early negotiations for successor agreements to the 1980-1982 labor con-

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[1] Affidavit references in the text, set forth as "—— Aff.—S/J Mot.," are to affidavits filed in the District Court in support of Allis-Chalmers' motion for summary judgment.

tract and Pension Agreement. Contract negotiations began in October 1981 and continued intermittently until July 31, 1982, when they were suspended because the parties were unable to achieve agreement. They resumed in October 1982, but an agreement was not reached before the November 1, 1982, expiration date of the labor contract and Pension Agreement. By agreement, that expiration date was extended to November 15, on which date the contracts terminated. Allis-Chalmers and the Union encouraged employees, however, to continue working beyond November 15, with Allis-Chalmers announcing on November 12 that work would be available for all employees at the wage rates of the expired labor contract. The plant continued to operate on this basis until a new labor contract, agreed to on January 24 and ratified on February 6, 1983, came into being (Pet. App. 2-3, 14).

During the contract negotiations, Allis-Chalmers made no proposal to reduce pension benefits. Its only pension proposal was to change the manner in which the Pension Plan was funded. The Union, on the other hand, sought improvement in the pension benefits. In the agreement ultimately reached in 1983, pension benefits remained unchanged (Equitz Aff.—S/J Mot.).

3. As the November 15, 1982, expiration date of the 1980-1982 labor contract and Pension Agreement approached, employees with early retirement eligibility, including the Petitioners, became concerned about the status of their retirement benefits under the Company's Pension Plan. Their concern was not about the sufficiency of retirement benefits under whatever new agreements would be negotiated, but

was rather with what might happen to the benefits during the so-called "window" period between the expiration of the existing labor contract and Pension Agreement and the ratification of new ones (Pet. App. 3, 5, 15).

In early November 1982, some employees eligible for early retirement asked Daniel F. Kern, Manager of Employee Relations and Communications Services for the West Allis Plant, whether there would be any changes in the pension benefits if an agreement on a new labor contract was not reached by November 15, 1982. Kern replied that the Company was not planning to change the pension benefits if the labor contract and Pension Agreement expired on November 15; and he assured the employees that if the Company position changed, the Union would be given timely notice, so that eligible employees could retire before any pension change became effective (Pet. App. 4; Equitz Aff.—S/J Mot.).

On or about November 12, 1982, Allis-Chalmers managers responsible for the formulation of bargaining strategy discussed a Union bargaining request that Allis-Chalmers issue a written statement promising employees advance warning of any pension plan changes. The managers concluded that no such statement would or should be issued, basing their decision on the following considerations: (1) Allis-Chalmers' long-standing policy of not becoming involved in influencing employee retirement decisions, including a previous instance when the Company had attempted unsuccessfully to persuade employees not to retire; (2) a desire to avoid additional unfair labor practice charges; (3) the effect that issuing such a statement might have on the parties' contract negotiations; and

(4) the possibility that such a statement could be deemed to act as a waiver by Allis-Chalmers of important rights under the Pension Plan, such as the Company's right to amend or discontinue it (Pet. App. 3-4, 16-17; Equitz Aff.—S/J Mot.).

4. A substantial number of eligible employees, including the Petitioners, opted for early retirement before November 15, 1982, the expiration date of the 1980-1982 labor contract and Pension Agreement. Although Allis-Chalmers refused to issue the written "advance warning" statement requested by the Union, the Company waived the seniority termination provisions of the labor contract and permitted employees retiring during November 1982 to rescind their retirements and return to work by November 30 without loss of seniority. Allis-Chalmers informed all the retiring employees of this permissive policy at the time they signed their pension applications. A total of 320 employees retired between October 31 and November 15, 1982, not including 61 employees who took advantage of the opportunity to rescind their retirements and return to work without loss of seniority (Pet. App. 44, 17; Equitz and Price Affs.—S/J Mot.).

5. During the 1982 contract negotiations, the Union filed with the National Labor Relations Board a number of unfair labor practice charges concerning Allis-Chalmers' bargaining conduct. Acting thereon, the Board's General Counsel issued an unfair labor practice complaint against Allis-Chalmers. In January 1983, additional charges relating to Petitioners' retirements were filed with the Board and the General Counsel sought to amend the complaint to include the substance of these charges. As part of the con-

tract settlement, and upon the ratification of the new labor contract in February 1983, the unfair labor practice charges were withdrawn and the complaint was dismissed (Pet. App. 4, 8, 18).

B. The District Court's Decision

As stated, the District Court granted summary judgment in favor of Allis-Chalmers and the Union. Although "sympathetic to [Petitioners'] predicament," the District Court held, insofar as Allis-Chalmers was concerned, that the Petitioners had been unable to establish a *prima facie* case of age discrimination because they had been unable to show that they had been constructively discharged (Pet. App. 22). The District Court found (1) that Allis-Chalmers "did nothing to make the [Petitioners'] working conditions intolerable," (2) that Allis-Chalmers had no duty to issue the written assurance about pension benefit changes that the Petitioners and other employees had sought, and (3) that the Petitioners "retired based on their own speculation about what might happen in the future" (Pet. App. 26-27). The District Court noted that the Petitioners were "seek[ing] to escape retirement decisions that, while agonizing, were voluntary," and concluded that the Petitioners' retirement choices were not "involuntary" (Pet. App. 24, 28).

The District Court held further that the Union's conduct had not been shown to be discriminatory within the ADEA's meaning (Pet. App. 28-30).

C. The Decision of the Court of Appeals

The Court of Appeals affirmed the District Court's grant of summary judgment to Allis-Chalmers and the Union. 799 F.2d at 312, 316; Pet. App. 2, 10. At

the outset, the Court noted that, in reviewing a summary judgment, it was obligated to review the whole record and to reverse "if it is revealed that inferences concerning material facts contrary to those of the trial court may be drawn." 799 F.2d at 312; Pet. App. 2. *Sub silentio,* the Court of Appeals found that no such "contrary" inferences could be drawn.

The Court of Appeals agreed with the District Court that the Petitioners had failed to demonstrate that their retirements amounted to constructive discharges. Applying the principle that "[a]n employer constructively discharges an employee only 'if it *makes* an employee's working conditions so intolerable that the employee is forced into an involuntary resignation,' " the Court held that Allis-Chalmers took no action that "made" the Petitioners' situation apparently intolerable; rather, the Court said, the situation resulted from the expiration of the Pension Plan, itself an event brought about by the failure of the parties' contract negotiations, and the passage of time. 799 F.2d at 314; Pet. App. 6. Additionally, the Court held that Allis-Chalmers did not violate the ADEA under a disparate impact theory, rejecting the Petitioners' contention that during the "window" period Allis-Chalmers' extension of the opportunity for employees to work at old contract rates adversely affected employees eligible for early retirement. 799 F.2d at 315; Pet. App. 6-7.

The Court of Appeals held further that the reasons exonerating Allis-Chalmers from violating the ADEA also exonerated the Union to the extent that the Petitioners' claims against the Union rested on its acquiesence in Allis-Chalmers' conduct. Nor did the Union violate the ADEA, the Court held, by making prag-

matic collective bargaining decisions adverse to Petitioners' interest, thereby resolving, in the interest of the entire Union membership, the Union's conflicting obligations to current and retired employees. 799 F.2d at 315-316; Pet. App. 7-10.

ARGUMENT

1. The decision of the Court of Appeals with respect to Allis-Chalmers[2] was predicated on the unique facts of this case and is correct. The case's singularity derives from the specific collective bargaining agreements between Allis-Chalmers and the Union, Allis-Chalmers' option of effecting pension changes during the so-called "window" period of the parties' negotiations, and, in the Court of Appeals' words, from "the expiration of the Pension Plan [which was] an event brought about by the failure of the contract negotiations and the passage of time." 799 F.2d at 314; Pet. App. 6.

2. The Court of Appeals correctly concluded, in agreement with the District Court, that Petitioners were not constructively discharged by Allis-Chalmers. No evidence was adduced that even remotely showed that Allis-Chalmers intended to cause Petitioners' retirements. See *EEOC v. Federal Reserve Bank*, 698 F.2d 633 (4th Cir. 1983); *Thompson v. McDonnell Douglas Corp.*, 552 F.2d 220 (8th Cir. 1977); *Muller v. U.S. Steel Corp.*, 509 F.2d 923 (10th Cir. 1975), *cert. denied*, 423 U.S. 825 (1975). Further, no evidence showed that Allis-Chalmers created intolerable working conditions which could be said to have

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[2] We do not address herein arguments in the certiorari petition with respect to the Petitioners' claims against the Union.

caused Petitioners' retirements, much less that Allis-Chalmers created such conditions with a view toward Petitioners' ages and in order to cause their retirements.[3]

Nor was Allis-Chalmers under a legal obligation to issue the written statement Petitioners sought that would have assured them that there would be no reduction in retirement benefits. The ADEA imposes no obligation to reassure potential retirees that their benefits will remain the same. The ADEA is not an affirmative action statute. *See, e.g., Tice v. Lampert Yards, Inc.*, 761 F.2d 1210, 1217 (7th Cir. 1985); *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1981). Contrariwise, Petitioners would impose upon Allis-Chalmers an obligation to take affirmative steps that would have enabled them to avoid the risks that are inherent for all employees in the collective bargaining process. Petitioners, however, are not entitled to be exempt from the latter risks simply because of their ages.

Further, as the Court of Appeals recognized (799 F.2d at 314, n.3; Pet. App. 9), in an analysis of the

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[3] There was no direct evidence of intentional age discrimination. Further, there was no indirect evidence of age-based motive. No economic reason existed for Allis-Chalmers to reduce the number of its older employees by coercing retirements. Indeed, Petitioners' retirements and their replacement by workers recalled from layoff was *more costly* to Allis-Chalmers than would have been the case had the Petitioners remained as employees. (Angermeier Aff.—S/J Mot.). Further, the most telling fact is that Allis-Chalmers offered all already-retired employees the opportunity to rescind their retirements and some 61 employees accepted and returned to work. 799 F.2d at 313; Pet. App. 4.

facts, Allis-Chalmers' bargaining situation is "important." For Allis-Chalmers to have issued the written reassurance statement that Petitioners sought, after having refused the Union's request that such a statement be issued, would have been contrary to Allis-Chalmers' duty under the National Labor Relations Act to recognize and bargain with the Union alone as exclusive collective bargaining representative of its employees. *See, e.g., NLRB v. M.A. Harrison Manufacturing Co.*, 682 F.2d 580 (6th Cir. 1982); *NLRB v. Jamaica Towing, Inc.*, 602 F.2d 1100 (2nd Cir. 1979); *C.K. Smith & Co.*, 227 NLRB 1061 (1977), *enf'd*, 569 F.2d 162 (1st Cir. 1977), *cert. denied*, 436 U.S. 957 (1978). Moreover, for Allis-Chalmers to have made a concrete commitment on a key fringe benefit issue would have interfered seriously with the normal collective bargaining process between Allis-Chalmers and the Union.

Finally, Petitioners were not confronted with actual, existing intolerable conditions of the sort necessary to support a constructive discharge conclusion. Petitioners were concerned only about what might happen, about what their future employment conditions and pension benefits would be, and not about what their existing employment conditions and pension benefits in fact were. See paragraph 5 of the boilerplate affidavit of Petitioner Monar at Pet. App. 38-40. In short, Petitioners were confronted with uncertainty—uncertainty that there might not be a new collective bargaining agreement, or that changes might be made in their retirement benefits. But such uncertainty is typical of what may confront any employee who is covered by a collective bargaining agreement with respect to any number of terms and conditions of employment. And it was precisely the

sort of uncertainty that, to a greater or lesser degree confronted *all* Allis-Chalmers employees when the 1980-1982 agreements expired, including those younger employees who also had an interest in their retirement benefits, although perhaps not as immediate as Petitioners'.

3. The Court also concluded properly that Allis-Chalmers did not violate the ADEA under a disparate impact theory. The essence of the disparate impact theory is that a facially neutral policy is nevertheless unlawful because it falls more severely on a protected group than on another group. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-431 (1971); *Dothard v. Rawlinson*, 433 U.S. 321, 328-29 (1977). Here, the correct answer to Petitioners' disparate impact contention that Allis-Chalmers deprived older workers of an employment opportunity offered younger workers by not announcing that pension benefits would remain unchanged (Pet. App. 25-29), is the one that the Court of Appeals stated: "This argument must fail because there is no act by Allis-Chalmers involved; rather [Petitioners] complain about the absence of an act. . . Allis-Chalmers was not obligated to rescue [Petitioners] from a predicament for which it was not responsible. To require it to do so would require Allis-Chalmers to treat older workers *better* than workers generally. The ADEA imposes no such obligation." [Emphasis in original]. 799 F.2d at 315; Pet. App. 7.

Because there was "no act" by Allis-Chalmers, it did the precise opposite of maintaining or applying a policy. Thus, in the context of disparate impact analysis, Allis-Chalmers' decision not to issue a "reassurance" statement was the equivalent of *not* having, for

example, a severance pay policy or *not* requiring employees to take tests. It cannot be seriously maintained that an employer which does *not* have a severance pay policy or which does *not* give tests to its employees nonetheless may be held liable under the disparate impact theory because some members of a protected group later assert that they would have been better off had the employer implemented such policies. Yet this, in essence, is Petitioners' position. If the position were to be accepted, any protected group could point to a situation where an employer had taken no action—had no policy—and could claim *post hoc* that the employer violated the law because if the employer had issued a policy (designed, of course, by the claimants) they would have been better off. Employers would thus be endlessly subject to second guessing and rationalization. No court has ever adopted such an approach; and this Court, like the Court of Appeals, should reject it here.[4]

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[4] Petitioners' reliance (Pet. App. 26-28) on *Transworld Airlines, Inc. v. Thurston*, 469 U.S. ——, 105 S. Ct. 613, 83 L.Ed. 2d 523 (1985) is misplaced. In that case, the airline *maintained a policy* of permitting captains disqualified from serving in that capacity for reasons other than age to transfer automatically to the position of flight engineer, while requiring age-disqualified captains to bid for flight engineer vacancies and to retire if no vacanies occurred prior to their 60th birthdays or if they lacked sufficient seniority to bid for those vacancies that did occur. The Court held that the airline's transfer policy denied 60-year-old captains a "privilege of employment" on the basis of age, saying: "The Act does not require TWA to grant transfer privileges to disqualified captains. Nevertheless if TWA does grant some disqualified captains the 'privilege' of 'bumping' less senior flight engineers, it may not deny this opportunity to others because of

4. Finally, contrary to Petitioners' contention (Pet. App. 32-34), the Court of Appeals' decision here is not in conflict with decisions of other Circuits. *Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985), one such case cited by Petitioners to support this contention, involved an issue as to the quantum of proof necessary in a mixed-motive situation to establish intentional discrimination and liability under Title VII. This case, of course, is not a mixed-motive case, there being no showing that Allis-Chalmers took any action whatever, much less that it acted for both discriminatory and non-discriminatory reasons. Similarly inapposite are the other cases Petitioners cite in this context: *EEOC v. Bordens, Inc.*, 724 F.2d 1390 (9th Cir. 1984); *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (3rd Cir. 1984); *Geller v. Markham*, 635 F.2d 1027 (2nd Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); and *Leftwich v. Harris-Stow State College*, 702 F.2d 686 (8th Cir. 1983). In the *Bordens* and *Westinghouse* cases, the employers actually *maintained policies* which denied severance pay to older workers; in the *Geller* case, the employer *maintained a policy* of only hiring teachers below a level of experience, thereby disadvantaging an older teacher; and in *Leftwich*, the employer *adopted* a faculty-selection *plan* that discriminated on the basis of age. Here, as the Court of Appeals stated, and as we have repeatedly pointed out, Allis-Chalmers took no action and maintained no policy or plan that can be said to have disadvantaged Petitioners.

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their age." 83 L.Ed. 2d at 533. Here, of course, as stated in the text, Allis-Chalmers maintained no policy which in any context could be said to have denied Petitioners a "privilege of employment."

CONCLUSION

For the foregoing reasons, further review by this Court is not warranted and the petition for a writ of certiorari should be denied.

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APPENDIX

RELEVANT STATUTORY PROVISIONS

Section 4, of the ADEA, as amended, 29 U.S.C. 623, provides in relevant part:

Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * * *

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way

which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

* * * *

86-1117 (A)

Supreme Court, U.S.
FILED
JAN 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

RAYMOND BARTMAN, et al.,

Petitioners,

v.

ALLIS-CHALMERS CORPORATION, INTERNATIONAL UNION, UNITED AUTOMOBILE AERSOPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether the District Court correctly dismissed Petitioners' ADEA claims because there was no issue of material fact as to whether or not the Plaintiffs' retirements from employment were voluntary?

2. Whether the District Court correctly dismissed Petitioners' ADEA claims against the unions because there were no genuine issues of material fact that the unions had not discriminated on the basis of age?

A LIST OF ALL PARTIES TO THE PROCEEDING BELOW:

The caption of the case in this Court contains the names of all parties except for those additional names listed in footnote 1 at pages ii and iii of Petitioners Petition for Writ of Certiorari; and, in addition, that Local 248, United

Automobile, Aerospace and Agricultural Implement Workers of America has also been Defendant-Appellee.

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IN THE

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' Statement of Facts contains numerous conclusory, unsupported

contentions and material omissions. This Respondent, United Automobile, Aerospace and Agricultural Implement Workers of America, and Local 248, (hereinafter "UAW" or "union") offers the following corrections:

1. During contract negotiations between Allis Chalmers (hereinafter "A-C") and the UAW in 1981 and 1982, A-C suffered from substantial business decline. A-C sustained a loss in 1981 and predicted further losses in 1982. (Equitz Aff., ¶9). On August 17, 1982, the company announced the elimination of certain diesel engine production lines and the removal of other work from the West Allis Plant at issue here, to another location, causing the loss of 350 jobs. On August 21, 1982, A-C made public its plans to lay off 650 additional workers in West Allis by the end of the year. The union believed that A-C planned to move all of its operations out of West

Allis altogether. (Petitioners App. p. 13; Roznik Aff. ¶5; Collins Aff. ¶45). The UAW authorized early 1982 contract negotiations to replace the contract set to expire November 1, 1982. (Roznik Aff. ¶3).

2. A-C never singled out or emphasized cost cuts in the retirement benefit area. The February 3, 1982 communication sent to employees stated in pertinent part as follows:

> "If there is some confusion on just how labor costs could be reduced, it should be explained that it has never been the company's intention that these reductions would come only from employees take home pay. We would prefer that cost reductions be made in the area of benefits as well, which are a very real expense to the company, but which employees do not see on their paychecks."
> Petitioners App. p. 60

The union perceived A-C as propagandizing for labor lost costs generally; nowhere was there any specific aim to cut retirement

benefits, (see Roznik Aff. ¶¶2 and 5; Collins Aff. ¶16, ¶21), in contrast to A-C's having in fact targeted the foundry for closure if general labor costs were not achieved. (Collins Aff. ¶20; Petitioners App., pp. 58-60).

The union decided not to strike after the contracts' extension through November 15, 1982 expired. (Roznik Aff. ¶10; Equitz Aff. ¶12). A-C distributed a memo dated November 12, 1982 to all West Allis employees stating as follows:

> "In October, Allis Chalmers and United Auto Workers union representatives agreed to extend the current labor contract to November 15. Talks between the company and the union have continued since that time, but to date, have not produced agreements for represented production workers.
>
> The contract will expire at midnight Monday, November 15. Further negotiation meetings are expected and will be scheduled by mutual agreement.

Employees of operations in production are expected to report, as usual, on November 16, and thereafter are expected to report in accord with existing work schedules. Employees will continue to be paid in line with current compensation programs." Petitioners App. p. 56-57.

3. During this period, the company did not propose to reduce pension benefits. A-C did, however, continue to advance its proposal to change the health insurance plan to have a co-pay feature. (Equitz Aff. ¶13). The local union advised its membership of the company's proposal with respect to health insurance. The union further made it known to its membership that it was not amenable to changing the existing benefit program. The union further stated that the employer had not proposed any termination of the pension plan or decrease in monthly benefits although the local union could not predict if or when such proposals might be advanced by the

company in the future. (Roznik Aff. ¶9).

4. A-C and the union did know that retirement eligible employees were concerned about the hard choice of keeping their jobs and taking their chances on future retirement insurance benefits during contract lapse, or electing early retirement so as to vest their insurance and retirement benefits under the old plan. As a result, the union made several proposals to resolve this period of uncertainty for retirement eligible members. The union asked for an extension of the entire labor agreement past November 15, 1982. Alternatively, the union indicated that they would accept A-C's standing offer to keep pension and retirement insurance benefits unchanged in exchange for the union's withdrawing

earlier proposals for improvement in those benefits.[1]

Following this, the union requested that a written statement be issued by A-C stating that it had no intention to change pension or retirement benefits even after the contract lapsed. A-C indicated that it had not announced any changes but would not be foreclosed from the possibility of doing so in the future. The company's chief negotiator, Howard Equitz, cited several problems which A-C had with owners, creditors, and business associates and stated

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1. The union further agreed to allow further negotiations regarding the funding of the pension plan which the company had earlier proposed. The company refused these offers stating that it did not want "piecemeal" negotiations wrapping up retirement benefits without also concluding a full collective bargaining agreement. (Collins Aff. ¶53).

that he could not predict what the future would entail. (Collins Aff. ¶54).

5. Collective bargaining continued after expiration of the contract. During much of the negotiations and continuing through the contract lapse, an unfair labor practice complaint was pending before an Administrative Law Judge which alleged that A-C had engaged in bad faith bargaining regarding its demands for concession, the closure of the foundry, direct bargaining with employees, midterm repudiation of the labor agreement, refusal to supply bargaining information and anti-union amicus. (Collins Aff. ¶28). The union understood that dismissal of the pending Board complaint would be a condition at arriving at a settlement of the negotiations and obtaining a new contract. (Collins Aff. ¶¶72-73). The union raised the subject of petitioners' retirements, which petitioners had

come to claim as "forced," at bargaining sessions in December, 1982; however, A-C refused to give in on the issue. (Roznik Aff. ¶17). On January 24, 1983 a tentative agreement was reached conditioned on two events:

1. Ratification by the local unions and;

2. Dismissal of the complaint by the Administrative Law Judge. (Roznik Aff. ¶10).

By that time, the Administrative Law Judge had moved to amend the complaint to include an allegation that related the retirements to the unfair labor practice charge already pending against A-C; however, that motion to amend had not been acted upon by the time the Administrative Law Judge did, in fact, dismiss the complaint as part of the contract settlement. (Collins Aff. Exhibit 7) In the course of agreeing to dismiss

the Board charge pertaining to the West Allis unit, the union obtained A-C's agreement to resolve an additional outstanding NLRB charge pertaining to recognition of a UAW unit at Batavia, Illinois. (Shoemaker Aff. ¶9).

SUMMARY OF ARGUMENT

Petitioners' Writ should be dismissed because no special or important reasons are present to grant the same. Petitioners failed to present a prima facie case of age discrimination against any Respondent. Summary judgment was properly granted by the District Court and affirmed by the Seventh Circuit.

PETITIONERS FAILED TO DEMONSTRATE A PRIMA FACIE CASE.

The present case presents no question which would require the attention of the Supreme Court. Rather, it is a routine dismissal by summary judgment on the basis that there are no genuine issues of material

fact demonstrating that petitioners stated a prima facie case of age discrimination.

Petitioners must either present a case of direct evidence of discrimination, or satisfy the indirect test of McDonnell Douglas v. Green, 411 U.S. 792 (1973); see TWA, Inc. v. Thurston, ___ U.S. ___, 105 S.Ct. 613, 622 (1985). Despite Petitioners' conclusory and inflammatory claims to the contrary, there is no evidence of record from which any reasonable inference can be drawn relative to an essential element of their case under either method of proof; namely, that their removal from the labor force was the result of any action by the Defendants.

The Petitioners were not forced to retire by the terms of the written pension plan. Rather, Petitioners retired because they were fearful and uncertain as to what, if any, changes the employer would make with respect to pension benefits if they

worked without a labor contract in place. Both the District Court and the Seventh Circuit correctly found that Petitioners had failed to present a prima facie case because they could not show any adverse employment action on the part of the Respondents. Petitioners retired simply and solely because they could not be guaranteed the opportunity to retire with their old retirement package intact if they worked beyond the expiration of the contract.

Petitioners have framed the question presented for review in a manner calculated to cast a conclusory pale on the Respondents without facing the actual question of their failure of proof. Petitioners pose the question for review in terms of whether or not A-C "knowingly and deliberately misled" its employees into believing that it would exercise its right to modify or eliminate "substantial retirement benefits during a

period of post-collective bargaining agreement work" when A-C had no intentions to eliminate the benefits. (Petition, p. i). Petitioners further claim that the union "abandoned" their age discrimination claims. (Petition, p. ii). So stated, it appears Petitioners contend that there is proof of direct evidence to discriminate.

The only evidentiary basis for Petitioners' contention against A-C is the February 3, 1982 letter from A-C to its employees in which the company explained that it was seeking labor cost reductions in both areas of wages and benefits. Petitioners then point to the fact that A-C internally monitored the number of retirements which were occurring or could be projected. On the basis of these two bits of information, Petitioners jumped to the unreasonable conclusion that the company's actions in refusing to extend the contract

or issue a statement with respect to their post contract intentions, demonstrated a deliberate campaign to force them to retire. As to the union, there is no proof that the Petitioners concerns were "abandoned." Rather, the union attempted to forestall their retirement choices, and when this was not possible, still attempted to bargain about their status but without success.

As the Seventh Circuit indicated in their opinion, the Court must:

> "view the whole record, and must reverse if it is revealed that inferences concerning material facts contrary to those of the trial court may be drawn. Powers v. Dole, 782 F.2d 689, 694 (7th Cir., 1986). We are not, however, required to draw every conceivable inference, but only those that are reasonable. Matthews v. Allis Chalmers Corp., 769 F.2d 1215, 1218 (7th Cir., 1985); Parker v. Federal National Mortgage Association, 741 F.2d 976, 980 (7th Cir., 1984)." (Petitioners App. p. 2).

Here, based upon the record, viewed in the light most favorable to Petitioners, there is no reasonable inference that such deliberate action, policy or plan on the part of A-C "forced" the Petitioners to retire. Neither is there any reasonable inference that the Defendant unions abandoned the Petitioners' claims or intentionally traded them off to obtain some other benefits to younger employees or the union as an institution.

Petitioners also failed to show a prima facie case under the McDonnell Douglas test; specifically, Petitioners could not demonstrate an adverse employment decision by either Respondent. While this may vary with the circumstances of the claim (failure to hire or promote or discharge), certainly more is required that what Petitioners suggest at footnote 7, p. 23 of their Petition:

1. Membership in the protected class;

2. Adequate job performance;

3. Replacement by non-protected workers.

Where, as here, Petitioners signed up for their own retirement, they must show some proof of being forced to do so as in being constructively discharged. Utilizing the least stringent test described by any Court of Appeals, however, Petitioners fail to demonstrate constructive discharge. There are no facts which show that A-C did anything which made "their working conditions so intolerable" that they were forced to resign. Vaughn v. Pool Offshore Company, 683 F.2d 922, 926 (5th Cir., 1982), quoting Young v. Southwestern Savings & Loan Association, 509 F.2d 140, 144 (5th Cir., 1975) quoted by the Seventh Circuit herein at Petitioners Appendix, p. 6. The Seventh Circuit went on to observe:

> "In the instant case the condition that 'made' plaintiffs situation apparently intoler-

> able to them was not any action of A-C, but rather the expiration of the pension plan, an event brought about by the failure of the contract negotiations and the passage of time. Plaintiffs have not argued, nor could they on this record, that A-C delayed the contract process in order to induce their retirements by allowing the plan to expire." (Petitioners App. p. 6).

In the instant Petition, Petitioners have shown no facts beyond those correctly reviewed below. This matter is simply a review of a summary judgment dismissal in which Petitioners had failed to demonstrate an essential element of their case. See Celotex Corp. v. Catrett, ___ U.S. ___, 106 S.Ct. 2548 (1986) wherein the Court recently reiterated that Rule 56 of the Federal Rules of Civil Procedure requires the granting of summary judgment where a plaintiff fails to make a sufficient showing to establish every essential element of his or her case. The present matter presents none of the

considerations enumerated in Supreme Court Rule 17 for the granting of a Writ of Certiorari:

A. There Is No Conflict Of Decisions Among The Federal Courts of Appeal.

The underpinings of the Seventh Circuit's Decision in this case was that the Plaintiffs had "failed to present evidence that any action by A-C caused their departure." (Petitioners App. p. 6). There is no contention and indeed there cannot be that there is any split in the Circuits with respect to ADEA cases necessitating proof of an adverse employment decision by a defendant which the plaintiffs seek to hold liable. Nor has there been a federal question decided in a way in conflict with any state court, or in any manner which departs from the accepted or usual course of judicial proceedings. In their Writ, Petitioners simply reconstruct the

arguments, conclusory statements and claims formed and rejected in both the District Court and Court of Appeals below.

B. The Writ Presents No Important Question Of Federal Law Which Has Not Been, But Should Be Settled By The Supreme Court Or Which Had Been Decided Below In A Way In Conflict With Applicable Decisions Of This Court.

Petitioners have suggested that the Seventh Circuit's opinion conflicts with EEOC v. Bordens, Inc., 724 F.2d 1390 (9th Cir., 1984) and EEOC v. Westinghouse Electric, 725 F.2d 211 (3rd Cir., 1983). In both those cases, separate employment benefit packages had been negotiated to two groups: one eligible for retirement benefits, the other not. No such facts are present here. In this case, exactly the same treatment was rendered by both the employer and union to both retirement eligible and non-retirement eligible employees.

Both were given the opportunity to work after the contract expired. Both were told that if they did work they would be "paid in line with current compensation programs." (Petitioners App. p. 57). There were no employment opportunities afforded to any class, or denied to any class on the basis of age.

TWA, Inc. v. Thurston, ___ U.S. ___, 105 S.Ct. 613 (1985) is distinguishable for the same reason. In TWA, pilots were mandatorily retired unless they could achieve a position of flight engineer prior to their 60th birthday; however, pilots displaced for reasons other than age did not have to resort to the bidding procedure. In this case, no employment practice, policy or employment action was taken by A-C on the basis of either the Petitioners' ages or retirement eligible status. No bargaining decisions were made by the union on the basis of age or retirement benefit status.

Rather than present any conflict with TWA, Inc. v. Thurston, supra, the Seventh Circuit's opinion is squarely in line with interpreting the ADEA upon the same interpretive standards as Title 7 of the Civil Rights Act of 1964, 42 U.S.C. §2000E, et seq. Specifically, with reference to the union's alleged discriminatory conduct, the Seventh Circuit "assumed (without deciding) that Plaintiffs could state an ADEA claim against the union based on failure to bargain with sufficient vigor citing Babrocky v. Jewel Food Co., 773 F.2d 857, 868 (7th Cir., 1985)." The Court stated, however, that "the record assembled below does not support Plaintiffs contention that the union simply abandoned them because it felt that the interests of younger workers were more important." (Petitioners App. p. 8). Indeed, the Court went on to state from the record as a whole the undisputed fact that

hundreds of other lower seniority workers had lost their jobs as a result of plant closures and subcontracting, and that all such job losses were the subject of the NLRB charges pending during the negotiations and dropped as part of the new Collective Bargaining Agreement. None were "bargained back." In analyzing the Plaintiffs' principal evidence of the union's intent to discriminate, (two statements allegedly made by the local President, Richard Roznik) the Court properly put such statements in context to analyze whether or not they would give rise to a reasonable inference of discriminatory intent. The context included the additional facts that after the alleged statements, the same local President did go on to try and bargain about the subject matter but was not successful. As the Seventh Circuit reviewed the record, it found that "the record reflects that the

union lost a lot of fights in the course of bargaining, and Plaintiffs' was one of them." (Petitioners App. p. 10).

CONCLUSION

The petitioners herein have pointed out no special or important reason why a Writ of Certiorari should be granted in this matter. The real issue is simply whether or not they have presented any proof of adverse employment action by way of constructive discharge, or any other direct evidence of discrimination. Both the District Court and the Court of Appeals have concluded that they have not. Based upon this, respondent respectfully requests that the Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 1987, three copies of the Brief for Respondent in Opposition were mailed, postpage prepaid, to:

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I further certify that all parties required to be served, have been served.

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